

CA20N

Z 1

-83H021

GOVT PUBNS



Ontario

ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND
RELATED MATTERS.

Hearing held
8th floor
180 Dundas Street West
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange

Commissioner

P.S.A. Lamek, Q.C.

Counsel

E.A. Cronk

Associate Counsel

Thomas Millar

Administrator

Transcript of evidence
for

18 April 1984

VOLUME 132

OFFICIAL COURT REPORTERS

Angus, Stonehouse & Co. Ltd.,
14 Carlton Street, 7th Floor,
Toronto, Ontario M5B 1J2

595-1065



ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN
AND RELATED MATTERS.


Hearing held on the 8th Floor,
180 Dundas Street West, Toronto,
Ontario, on Wednesday, the 18th
day of April 1984.

THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner
THOMAS MILLAR - Administrator
MURRAY R. ELLIOT - Registrar

APPEARANCES:

P.S.A. LAMEK, Q.C.)	Commission Counsel
E. CRONK)	
T.C. MARSHALL, Q.C.)	Counsel for the Attorney
D. HUNT)	General and Solicitor General
L. CECCHETTO)	of Ontario (Crown Attorneys
	and Coroner's Office)
I.G. SCOTT, Q.C.)	Counsel for The Hospital for
M. THOMSON)	Sick Children
E. BATTY)	
B. PERCIVAL, Q.C.)	Counsel for The Metropolitan
D. YOUNG)	Toronto Police
W.N. ORTVED	Counsel for numerous doctors
	at The Hospital for Sick
	Children
B. SYMES)	Counsel for the Registered
F. KITELY)	Nurses' Association of Ontario
E. McINTYRE)	and 35 Registered Nurses at
	The Hospital for Sick Children
H. SOLOMON	Counsel for The Ontario
	Registered Nursing Assistants

(Cont'd)...



Digitized by the Internet Archive
in 2024 with funding from
University of Toronto

<https://archive.org/details/31761118501600>



APPEARANCES: (Cont'd.)

D. BROWN	Counsel for Susan Nelles - Nurse
C. THOMSON, Q.C.) G.R. STRATHY) E. FORSTER)	Counsel for Phyllis Trayner - Nurse
M. ROSENBERG	Counsel for Sui Scott - Nurse
J.A. OLAH	Counsel for Janet Brownless - R.N.A.
B. KNAZAN) B. JACKMAN)	Counsel for Mrs. M. Christie - R.N.A.
S. LABOW	Counsel for Mr. & Mrs. Gosselin, Mr. & Mrs. Gionas, Mr. & Mrs. Inwood, Mr. & Mrs. Turner, Mr. & Mrs. Lutes and Mr. & Mrs. Murphy (parents of deceased children)
F.J. SHANAHAN	Counsel for Mr. & Mrs. Dominic Lombardo (parents of deceased child Stephanie Lombardo); and Heather Dawson (mother of deceased child Amber Dawson)
W.W. TOBIAS	Counsel for Mr. & Mrs. Hines (parents of deceased child Jordan Hines)
J. SHINEHOFT	Counsel for Lorie Pacsai and Kevin Garnet (parents of deceased child Kevin Pacsai)



1

18apr84
A
BMCrc

2

--Upon commencing at 10:00 a.m.

3

THE COMMISSIONER: Yes, Mr. Lamek.

4

MR. LAMEK: Mr. Commissioner, there

5

was yesterday a meeting of all counsel involved in

6

this matter. I think I can describe it as a very

7

useful meeting. The meeting was to consider the

8

effect the Judgment of the Court of Appeal may

9

have on the evidence that is admissible here and I

10

think it proper to report that although each of the

11

counsel present at that meeting was rightly con-

12

cerned to protect the position of his or her own

13

client, there was a general recognition of the

14

difficulties that the Commission now faces and I

15

believe a desire to resolve the difficulties in a

16

reasonable way to the extent that lies within the

17

power of counsel.

18

I hope I can summarize the discussion

19

on Phase I at that meeting fairly and accurately by

20

saying there was acceptance by all counsel of a number

21

of matters of either principle or underlying assumption,

22

and they were these, sir:

23

First, that your mandate to determine

24

how and by what means the babies died has been

25

restricted only by the prohibition against you naming

the administrator of any fatal overdose that you may



1
2 find to have been given and in all other respects,
3 including the characterization of the overdoses, if
4 any, as accidental or not accidental, your mandate
5 appears to have remained untouched by the Court of
6 Appeal judgment;

7 Second, the prohibition against
8 naming names has this effect on the proceedings.
9 Because you are not permitted in your report to
10 identify a perpetrator, you may not receive new
11 evidence or take into account earlier evidence directed
12 to the identification of a perpetrator, and I stress
13 the word "directed" there, sir;

14 But, third, if evidence, past or
15 future, assists you in coming to a conclusion on how
16 and by what means babies died, the fact that that
17 same evidence may tend to identify an administrator
18 of an overdose does not necessarily make that evidence
19 inadmissible.

20 May I give an example, sir, of the
21 kind of thing that was discussed yesterday, an example
22 referring to evidence which you mentioned in your
23 statement on Monday and which was expressly discussed
24 yesterday.

25 You will recall, sir, I know that
Nurse Bell has given evidence of seeing Nurse Trayner



1
2 injecting something into the buretrol on Allana
3 Miller's IV a few hours before that child died. That
4 evidence presumably could be of assistance to you,
5 along with much other evidence about the Miller
6 case, in coming to a conclusion that Allana Miller died
7 as a result of having received an overdose of digoxin
8 which was not accidentally administered. And for
9 that reason, to the extent it might assist in coming
10 to such a conclusion, it would clearly be desirable
11 to pursue that evidence to seek Mrs. Trayner's
12 explanation for it and so on.

12 But, of course, that evidence also
13 has the potential to implicate Mrs. Trayner in the
14 death of Allana Miller and, in that respect, may be
15 said to go to the identification of the administrator
16 of an overdose to that child.

16 Now, as I understood the meeting
17 yesterday, it was agreed by all counsel, including
18 Mr. Strathy, who was there, that the possible
19 importance of that evidence to the question of the
20 cause of Baby Miller's death makes the evidence
21 admissible, notwithstanding that it may also implicate
22 Mrs. Trayner. It should be admitted, not for the
23 purpose of identifying the perpetrator, a finding which
24 you are not permitted to make, but for the purpose of
25



1
2 assisting you in determining how and by what means
3 Allana Miller died, a finding which you are required
4 to make.

5 So, the third principle that seemed
6 to emerge from the meeting yesterday, sir, was that
7 evidence that may bear on the identity of a perpetrator
8 is not automatically excluded.

9 And fourth and last, where evidence
10 has such a dual character, that is, where it may bear
11 on cause of death and on identity, then it should be
12 admitted if it appears to you that it may have
13 sufficient probative value on the cause of death
14 question to justify its reception with the consequent
15 implication of an individual.

16 I recognize, sir, and it was
17 recognized yesterday, that that involves a balancing
18 to find out what I can call the centre of gravity of
19 where a particular kind of evidence may lie, but the
20 balancing process is, as we recognize, made that much
21 more difficult when you have to do it without having
22 perhaps heard the evidence developed.

23 But I suggest, respectively, in a
24 sense it is the same process that you went through
25 regularly in the days when you were a trial judge
and particularly when you were sitting with a jury.



1
2 Although it is not necessary, I know, to raise the
3 caution, the Court of Appeal has said of course that
4 in doing that balancing, in drawing the line and in
5 determining whether particular kinds of evidence are
6 admissible, doubt has to be resolved in favour of
7 the person whose civil liberties may be prejudiced by
8 the evidence.

9 Mr. Commissioner, to the extent
10 that it is possible, I suggest it is desirable to
11 come now to an initial conclusion about certain
12 areas of evidence in order that we may all know in
13 advance what seems to be permissible and what seems
14 to be off limits. We therefore canvassed the views
15 of people present on the particular matters referred
16 to by you in your statement on Monday and on certain
17 other matters. Of course, sir, the decision is
18 yours as to what you will and will not permit by way
19 of evidence, and I report the conclusions yesterday
20 where there was a consensus at least in the hope they
21 may be of assistance to you. Clearly, you are not
22 obliged to pay the slightest bit of attention to them.

23 Before I get to those matters, I
24 should perhaps say two things: First, although I have
25 spoken in terms of the reception of evidence, the
questions which we as counsel considered yesterday and



1
2 which you will have to decide go not only to the
3 reception or rejection of new evidence that is
4 tendered or adduced in chief, those matters also go,
5 particularly at this stage of the proceedings, per-
6 haps even more importantly, go to matters in previous
7 testimony and exhibits which may properly be canvassed
8 with Mrs. Trayner, with any further witness in Phase I
9 and to which reference might, in the absence of a
10 ruling by you to the contrary, to which reference
11 might be made in argument, and they go to permitted
12 or prohibited areas of cross-examination of Mrs.
13 Trayner and of any further witnesses in this phase.

13 In the particular case of Mrs.
14 Trayner, for example, I have already asked her about
15 the alleged conflict between herself and Miss Nelles.
16 I did that before the Court of Appeal decision was
17 delivered and before you, on Monday, raised the
18 question as to the continued propriety of that line
19 of investigation. The question now is whether that
20 is an area that other counsel may enquire into further
21 in cross-examination of course.

21 The second point before getting to
22 the particulars, sir, is that Mr. Strathy made it
23 clear yesterday, and I would expect Mr. Thomson to
24 do so again today, that even if you should rule that a
25



1
2 particular area is a proper one for cross-examination,
3 counsel for Mrs. Trayner may yet object to particular
4 questions if they offend the guidelines which Mr.
5 Thomson suggested in his opening statement last week.

6 Now, any such objection, as I under-
7 stand it, will go not to the substance of the subject
8 matter of the evidence about which Mrs. Trayner may
9 be cross-examined, you will already have ruled on that
10 matter, but rather to what Mrs. Trayner's counsel may
11 consider to be the objectionable form of questions or
12 manner of cross-examination. But that is a constant,
13 it really isn't dependent upon the rulings that you
14 may make, although I have no doubt that since last
15 Thursday the propensity to object to cross-examination
16 may be heightened.

17 In your statement on Monday, sir --

18 THE COMMISSIONER: I'm sorry, I don't
19 understand, but I guess I will hear from Mr. Thomson
20 on it.

21 MR. LAMEK: Well, Mr. Thomson, as I
22 understand him, and of course he can speak for himself
23 far more ably than I could speak for him, he is saying
24 the fact that I acknowledge that an area may be
25 enquired into should not be taken as a withdrawal from
the position that I took at the opening of Mrs. Trayner's



1
2 evidence that certain kinds of cross-examination should
3 not be permitted.

4 THE COMMISSIONER: Does that mean the
5 manner? Do you mean if it is too 'cross'?

6 MR. LAMEK: I think it may be partly
7 the manner, but it may be the form of the question and
8 the intent of the question that is the concern.

9 THE COMMISSIONER: Well, I will hear
10 from Mr. Thomson on that.

11 MR. LAMEK: Yes, I think so.

12 MR. THOMSON: You will, sir.

13 MR. LAMEK: On Monday, sir, in your
14 statement, and in particular on pages 414 and 415 of
15 Volume 131, you referred to particular areas which
16 may now be irrelevant, and that was your language,
17 sir. They were these:

18 You said:

19 "Let me just mention some of the
20 evidence hitherto received without
21 objection which now may be irrelevant:

22 (a) The alleged conflict between
23 nurses.

24 (b) The pills in the salad and in
25 the soup, and the telephone calls
and the markings on the cars
and doors.



B/DM/LN
1

(c) The reaction of any particular person to the cardiac arrests of the children and to the drawing of blood during those arrests and the prosecution of Susan Nelles.

(d) The evidence that a particular person did or did not appear to administer medication at a time when no medication was prescribed.

(e) The presence or absence of any person at the bedside of any child during the critical period, including the findings of the Atlanta Report."

I can tell you, sir, that all counsel yesterday were of the view that you may continue to receive and consider evidence on all of those matters except (b), that is to say what I call the dirty tricks or the bizarre incidents evidence. As to that area, there was a difference of opinion those who held strong views under that question will no doubt make their submissions to you shortly on that, sir.

We also considered other areas of the evidence which have not been expressly referred



1
2 to by you, and notably three of them. That is to
3 say the meetings of Monday, March 23rd, and you will
4 recall, sir, that we have heard evidence of two
5 meetings on that day, one at Mrs. Trayner's house
6 in the afternoon, (2) Mrs. Radojewski's house in
7 the evening. There has been evidence which has
8 been restricted in its scope for the purposes of
9 phase one, we considered whether that too was a
matter which could be pursued further.

10 Second, we considered the evidence
11 that there has been as to discussions among nurses
12 as to euthanasia, quality of life and so on.

13 And third, and lastly, the evidence
14 of, I believe it was Miss Frise, as to the alleged
15 availability of digoxin over the counter without
16 prescription at a drug store in the Eaton Centre.

17 Now, Mr. Commissioner, I
18 conceive it to be my duty to do more than merely
19 report to you the views of the Counsel. I feel
20 obliged to tell you my own position and I hope
21 it may be helpful to you, or of assistance to
22 other Counsel who may have different views.

23 In my submission you should continue
24 to receive evidence and to permit cross examination
25 in areas (d) and (e) identified by you.



3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

That is to say the Bell evidence involving Allana Miller; and the whereabouts of people at critical times on the ward. I include in that the findings contained in the Atlanta report.

In my submission, those matters may be of sufficient assistance in your consideration of the cause of death, that they are clearly relevant and admissable for that purpose, even though they may make reference to one or more persons as perhaps having been involved in or associated with the deaths.

On the other matters raised by you on Monday, sir, I confess to being ambivalent. It may be that some of the areas go to possible motive for the administration of overdoses to patients. I recognize that motive is only relevant to deliberate acts. Therefore, if you should conclude that a motive existed you might therefore find it more likely that overdoses were deliberately administered. I can't suggest the assistance you may derive from evidence in these areas is so clear to me that I can argue strongly in favour of your admitting or continuing to admit them. I think the argument can be made on both sides, and if I may, sir, I would leave it to be made by those with stronger views



4
1
2 than my own.

3 On the additional areas of evidence
4 that were reviewed at yesterday's meeting, which I
5 have referred to already, sir, it is my submission
6 that the evidence as to the meetings of Monday,
7 March 23rd, 1981, should be received and continued
8 to be received in the manner and to the extent
9 received heretofore. That is to say as to the
10 discussion about Pacsai, the inquest and cause of
11 death there, and any wider discussions as to the
12 cause of death and to the significance of the events
13 that had occurred on the ward on Sunday and Monday.

14 On the question of the evidence of
15 discussions of euthanasia and quality of life, that
16 again is a matter on which I find myself without a
17 firm opinion on either side, and perhaps I can leave
18 that to be argued by those who feel strongly one
19 way or the other. I confess that evidence as to
20 the alleged availability of digoxin over the counter
21 in a drug store, without prescription, leaves me
22 rather cold and it would be my submission that that
23 is not a matter in any event that needs to be
24 pursued any further. Again others may have a
25 different view of that.

26 That, sir, is what I hope is an



5

1

2

3

4

accurate and reflective report of yesterday's meeting and such submissions as I have been able to make on the matters that were raised.

5

THE COMMISSIONER: What about Phase II.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. LAMEK: Yes. There was discussion about Phase II, sir. A range of opinion but fairly I think I can report that several Counsel perceived the same difficulty with Phase II that you, yourself had adverted on Monday. I suggest that with respect to that rather than confuse the issue as it involves Mrs. Trayner's evidence, the matter of immediate concern, that we deal with the Phase I matters today, and continue if it is thought appropriate then with Mrs. Trayner's evidence and upon the completion of Mrs. Trayner's evidence, depending on when it happens, either the afternoon if it happens in the morning, or the next day if she should complete her evidence in the afternoon, call for submissions on what you may or may not do in Phase II in light of (a) the terms of Reference and (b) the Court of Appeal decision.

THE COMMISSIONER: Yes. Thank you. Well, now somebody may have something particular to say. Mr. Thomson?



1
2 MR. THOMSON: I have something to
3 say.

4 THE COMMISSIONER: Yes. All right.

5 MR. THOMSON: Mr. Commissioner, I
6 open by observing that although the Court of Appeal
7 did not in specific terms comment upon the kind of
8 evidence that ought now to be accepted here, or the
9 kinds of questions that are appropriate --

10 THE COMMISSIONER: To their credit,
11 they were not asked.

12 MR. THOMSON: I agree. But they
13 said some things that may have a impact on both of
14 those issues, that is really what I was coming to
15 address.

16 THE COMMISSIONER: That is what
17 is worrying me, because I don't want to take evidence
18 that is not going to be useful to me and I'm not
19 going to be able to make use of it, that is where
20 the problem was.

21 MR. THOMSON: I appreciate that,
22 sir. It is therefore my first submission, and I
23 think it is fundamental to everything that I am
24 going to say that we keep this in mind. I am
25 happy that Mr. Lamek agreed, he seemed to say the
same thing. That is if evidence is not --



7
1
2 THE COMMISSIONER: I am saying it
3 too, you don't need to emphasize that point I am
4 entirely with you.

5 MR. THOMSON: Then I go to the
6 second point.

7 THE COMMISSIONER: Yes. All right.

8 MR. THOMSON: It is perhaps
9 important for us to decide at this stage whether
10 your mandate depriving you of the opportunity, as
11 you thought you had, to name possible perpetrators
12 of some wrong doing, does that mandate by implication
13 preclude you from making findings of fact which
14 would point almost certainly in that result. Does
15 it interfere with your opportunity to make findings
16 of credibility that otherwise were open here. At
17 the moment I am asking those questions, because it
18 was implicit in the consensus reached by Counsel
19 who discussed the matter yesterday, upon which Mr.
20 Lamek reported, that, for example, you would be
21 deciding on the evidence that you will hear with
22 respect to the Miller child.

23 Because if you are not going to be
24 able to decide whether to accept my client's
25 evidence, and you know in substance what that will
be; if you are not going to be in a position,



1
2 a matter of law, and jurisdiction, and power, to
3 decide whether or not you can accept her evidence
4 because of the implicit limitations in the Judgment
5 of the Court of Appeal, then I say with respect if
6 that is the view then the matter should not be
7 proceeded with at all.

8 THE COMMISSIONER: I'm sorry,
9 what matter are you talking about, the enquiry?

10 MR. THOMSON: The investigation of
11 the areas such as the Miller incident, which as my
12 friend said obviously on the face of it are relevant,
13 but if you can't decide; if you, and I say to you
14 it is very important on the question of the ruling
15 this morning, that you tell us whether or not in
16 your view you have the authority to decide whether
17 or not Mrs. Trayner's evidence is acceptable, is
18 believed, because if you don't have that finding,
19 if you don't have that power, sir, then all that we
20 are going to be doing is pursuing evidence, in public,
21 which is going to be reported on in the papers, and
22 observed on the television.

23 THE COMMISSIONER: Yes --

24 MR. THOMSON: ... which is not
25 helpful to the final decision.



EMT.jc
C

1

2

THE COMMISSIONER: Are you suggesting
I don't have that power? Is that it?

4

5

6

7

THE COMMISSIONER: Yes.

8

9

MR. THOMSON: -- and see what we make
of this?

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

"It was probably inherent in the
terms of the Order-in-Council that
the task of meeting the need of the
parents and the public as a whole to
be informed of all available
evidence by full examination of the
matters to be inquired into and to
ensure full public knowledge of the
completeness of the matter referred
to, but to do so without expressing
any conclusion of law regarding civil
or criminal responsibility was one
of extreme difficulty, at times
approaching the impossible."

And I underline that because I say it is virtually
impossible.



C.2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

"Where such an impasse arises it should be resolved in our opinion by a course that best protects the civil rights of the persons the limitation was designed to protect."

Now you may find yourself in a position here that there are, for example, conflicting testimony before you with respect to the time at which medication was administered to the Miller child.

If you find that my client's evidence is accepted, presumably that could point to her not having administered medication at the wrong time which, of course --

THE COMMISSIONER: The only reason why I would be considering the evidence, obviously as Mr. Lamek has said, is because it might assist me in determining whether or not the child (that is Allana Miller) died by the administration of medication.

MR. THOMSON: I understand that.

THE COMMISSIONER: That is the only point in doing it.

MR. THOMSON: Yes.

THE COMMISSIONER: Unfortunately if that evidence is allowed in the real problem, and it



C.3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

may well be - everybody seems to concede - that evidence is relevant to the question of how the child died, the real problem will come in the report because whether I can then - the evidence itself, the acceptance or rejection of that evidence which I need to determine one thing will obviously point or may or may not point in the direction that I am not supposed to deal with.

MR. THOMSON: Now we are at the issue, sir.

The question is whether or not if you now decide you are not going to be in a position to weigh the evidence that we are now discussing, and I am not disagreeing with the logic that you just put to me - I mean what could on the face of it be more relevant if your mandate is limited to finding how and by what means did the Miller child die? I recognize the logic in that.

But what I now ask you to determine because it is the reason I started by saying you ought to be clarifying your mandate now, with respect, so that then counsel here can have a reasonable basis of deciding where we go because if you are going to decide that you don't have the right to weigh that evidence because in your report coming to a certain



C.4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

conclusion will violate the other terms of the
mandate creating something that the Court of Appeal
says approaches the impossible, then in my submission
that matter ought to be dealt with now.

THE COMMISSIONER: Yes, but if I don't
receive the evidence, and if I don't weigh it, then
there is no point in receiving the evidence obviously
at all because I am told by the Court of Appeal that
I must receive all of the evidence that goes to the
cause of death. All the Court of Appeal has said
to me is you must not, after having reached - if you
reach a decision - that it was either an accidental
or deliberate administration of digoxin, don't say
who did it.

(2)

Now I have to receive the evidence.
Let's take an extreme example that someone saw someone
poisoning a child; you saw it was digoxin right in it,
saw them doing it, can I receive that evidence or
can I not?

I would think clearly under the Court
of Appeal's direction I must receive the evidence and
then I receive it: I say there is this evidence;
therefore I find that the child died of digoxin
poisoning, and that as I understand it is what the
Court of Appeal is saying.



C.5

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

It may mean, of course, that no one, a five year old child reading the report, couldn't reach the conclusion that someone was the perpetrator, but I just can't say it. That is an extreme example. I must say so far that evidence hasn't been forthcoming.

MR. THOMSON: I appreciate that, and if we can talk about the matter --

THE COMMISSIONER: Surely I have to weigh the question as to whether I accept the evidence of someone having seen digoxin given to the child, if I am going to find on the basis of that evidence that there was an overdose of digoxin, I have to decide whether I believe the evidence, do I not? How can I do it?

MR. THOMSON: I appreciate that. The Court of Appeal perhaps in their comment that the matter is of extreme difficulty, at times approaching the impossible, is suggesting that perhaps you can't make findings that approach that area.

I can tell you one of the things that concerns me, sir, is the practical question that as this proceeding started and as questions were originally being posed of Mr. Lamak, my expectation in allowing all these matters to be put here was that



C.6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

you would at the conclusion have the power, if you accepted my client's evidence, to find that she was credible, to find that she had not been a party to the administration of any drugs for the purpose of causing death --

THE COMMISSIONER: Well --

MR. THOMSON:--and to the extent that that mandate, that power that you thought you had at the opening is to any extent curtailed by virtue of the decision of the Court of Appeal, plainly that is a matter of considerable concern from my standpoint.

THE COMMISSIONER: Yes. All right.

MR. THOMSON: Then I think that the issues that Mr. Lamek raises brings to the fore once again the matter that I raised in opening. I think it is appropriate that I raise them again now.

Mr. Lamek has been reviewing a number of questions, and in doing so has put questions in a probing manner that has been attempting to search the memory of my client to ensure that everything that she can remember, all the facts that she can present will be put forward in this public forum. As I said one reason why I had allowed that was with the expectation that you could if you accepted it make findings in her favour accordingly.



C.7

1
2
3 Now there is a different question
4 that will arise as far as cross-examination is
5 concerned by counsel on behalf of the Attorney General
6 and the Police Force. It is my respectful submission
7 that the mandate that you have, first of all,
8 starting with the request of the Attorney General
9 that questions that are not necessary not be asked;
10 secondly, going from there to the fact that you were
11 asked to report on how and by what means these
12 children died, and not to make a specific finding
13 as you are in the second phase of the Inquiry.

14 It does seem to me that considering
15 that the scope of your mandate now does not allow you
16 to name a person whom you may suspect of criminal
17 activity, that it is wrong to permit counsel for the
18 law enforcement --

19 THE COMMISSIONER: The reason that I
20 gave, the main reason - well, there are two large
21 reasons: one really almost insuperable reason is
22 the delay - of course we may have to change some of
23 the rules of the game - but the main reason why the
24 Attorney General and the Police are in Phase I are
25 it is important that they establish that there were,
let's say, suspicious deaths, deaths that were not the
result of the symptoms or the natural condition of the



C.8

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

children, because if they cannot establish that, then obviously the whole prosecution is a dubious exercise. If in fact all the children died from natural causes what were they doing charging anyone? Therefore they have an interest. That ruling I made when Mr. Sopinka - that hasn't been changed by the Court of Appeal Decision.

MR. THOMSON: I read that ruling and I accept it. I was not going to say this morning that they do not have the status to ask questions, which is what Mr. Sopinka had argued.

But I say that you, particularly having regard to the Decision of the Court of Appeal here, ought to rule that they do not have the right to challenge my client's evidence in cross-examination. They do not have the right to challenge her credibility, to demand explanations of allegedly inconsistent evidence or possibilities.



D
BB/cr

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COMMISSIONER: This applies you
say just to the Attorney General and the Police?

MR. THOMSON: And anyone else, anyone
else.

THE COMMISSIONER: No one has the --

MR. THOMSON: No one.

THE COMMISSIONER: Well then why should
we have her evidence at all.

MR. THOMSON: Well, Mr. Lamek is
entitled to bring the material before you. May
I put this to you?

THE COMMISSIONER: Yes.

MR. THOMSON: You have no right to
put her on trial before the public which is what
the produces if you say that those people have got
the right to confront her with allegations, with
innuendo, with accusations.

THE COMMISSIONER: But I'm not saying
they have the right to do any of those things, I
am merely saying if she is going to give evidence on
matters that are relevant to the matters that I can
determine she must be cross-examined on them. It
is outrageous to suggest that you can't cross-
examine a witness, our whole system disappears.

MR. THOMSON: But I said by



2
1
2 cross-examination, sir, that you're not entitled
3 to confront her with accusations, innuendo, with
4 alleged inconsistencies which by inference say 'you
5 did it didn't you,' that's wrong.

6 THE COMMISSIONER: Well, you might quite
7 well be right with that but please we are now dealing
8 with what subject matters we can go into. Obviously
9 if someone wants to say, start off the examination by
10 saying, Mrs. Trayner, you did it, didn't you, that
11 would be a highly improper question and I can assure
12 you I would rule in your favour with perhaps the
13 loudest voice I am capable of.

14 MR. THOMSON: Thank you, sir. I know
15 the incident sounds amusing to some in the room but
16 may I say it is not amusing at all from the stand-
17 point of my client who has been watching television
18 and reading the newspapers.

19 THE COMMISSIONER: But it is not going
20 to happen. Please don't put something like that into
21 somebody's head because it's an outrageous proposition
22 that anyone would do it.

23 MR. THOMSON: Well, just a moment now,
24 sir, with respect, Mr. Hunt when he examined Miss
25 Nelles asked a number of questions, the thrust of
which was to say doesn't it look kind of suspicious



3
1 as to what Mrs. Trayner did, we had better wait until
2 we get her here, what about this, Miss Nelles, don't
3 you think Mrs. Trayner might have done that. You
4 were here and I read that and I must say I am entitled
5 to be apprehensive when counsel for the Attorney
6 General comes forward and asks questions of that kind
7 in public about my client.

8 THE COMMISSIONER: I don't think there
9 was any objection at the time he was asking Miss
10 Nelles the question; there may have been. There
11 certainly was objection to his even being allowed in
12 the room but once he was in the room he was allowed
13 to ask all of those questions and I trust he will
14 not make the improper questions that you are worried
15 about but if he does by all means stand up and holler.

16 MR. THOMSON: All right. So, I think
17 that for the moment we have canvassed the problem
18 areas.

19 THE COMMISSIONER: Yes, all right.

20 MR. THOMSON: And we will see how we
21 go.

22 THE COMMISSIONER: Have you any views
23 on any of these issues that seem to be still in
24 dispute?

25 MR. THOMSON: Well, I think that perhaps
I should wait and see what if any of those areas other



1
2 counsel think ought to be explored.

4
3 THE COMMISSIONER: Apparently there
4 is a problem with respect to - certainly there is
5 a problem with respect to what Mr. Lamek has
6 described as the dirty tricks. What is your view
7 with respect to that?

8 MR. THOMSON: Well, at the moment I
9 haven't heard anyone who thinks that they are
10 sufficiently relevant that they are going to insist
11 on asking questions and I'm not here to waste your
12 time.

13 THE COMMISSIONER: Well, I take it by
14 that that you don't approve then?

15 MR. THOMSON: I probably don't but I
16 will wait and see. Someone may give such an over-
17 whelmingly persuasive explanation then perhaps I
18 will accede.

19 THE COMMISSIONER: Yes, all right,
20 thank you. Mr. Brown? You don't have to say
21 anything if you don't want to.

22 MR. BROWN: It will be short, sir.

23 THE COMMISSIONER: Yes, all right.

24 MR. BROWN: Simply to put on the record
25 our understanding of the decision of the Court of
Appeal and the effect that it has on the proceedings



1
2 in Phase I.

3 It is our understanding that the
4 Court of Appeal has circumscribed the comments that
5 you may make in your report.

6 THE COMMISSIONER: Well, that is
7 something that we don't have to solve today. It is
8 a problem but allow me a little time to think
9 about that one.

10 MR. BROWN: It was our understanding,
11 sir, that the Court of Appeal Decision did not
12 fetter you in hearing evidence which was relevant
13 to go into the cause of death, nor did Mr. Sopinka
14 in the Court of Appeal argue or suggest that the
15 evidence should be limited.

16 In light of that, it would be our
17 submission that the questions which have been asked
18 to date of the nurses and the subject matters that
19 have been canvassed are properly the subject matter
20 for future witnesses.

21 THE COMMISSIONER: Well, not if they
22 go surely only to identity.

23 MR. BROWN: Well, if there is some
24 reasonable relevance to the cause of death the
25 evidence should be admitted.

THE COMMISSIONER: Well, yes, but again,



1
2 I think Mr. Lamek said that the Court of Appeal has
3 told me that where it is touch and go I should ...

4 MR. BROWN: You should err on the side
5 of caution.

6 THE COMMISSIONER: I should lean in
7 favour of the citizen.

8 "Where such an impasse arises it
9 should be resolved, in our opinion,
10 by a course that best protects the
11 civil rights of the persons the
12 limitation was designed to protect."

13 MR. BROWN: If the evidence goes solely
14 to identity and nothing else and if it is of help and
15 of assistance to you.

16 THE COMMISSIONER: Well, I think it
17 goes farther than that. I think if it goes to
18 identity largely and very little to the cause of
19 death I think under those circumstances they are
20 telling me don't hear it.

21 MR. BROWN: Definitely. All I wanted
22 to submit to you, sir, was that it was our under-
23 standing of the Court of Appeal Judgment that
24 greatly circumscribed in the evidence that you have
25 heard and that in practical terms a number of the
subject matters that have already been canvassed
would properly be subject matters for examination of



1
2 future witnesses.

3 THE COMMISSIONER: Yes.

4 MR. BROWN: In terms of particular
5 areas, Mr. Lamek raised the matter of the dirty
6 tricks. It is our submission that the fact of the
7 dirty tricks goes to two areas: First, it goes to
8 Phase II, the fact that they happened and the response
9 by the Law Enforcement Authorities to those acts,
10 but that is not properly a matter to be decided at
11 this point in time.

12 THE COMMISSIONER: No.

13 MR. BROWN: Secondly however it would
14 be our submission that the nature of the dirty tricks
15 may assist in characterizing whether or not deaths
16 in the Hospital were the result of an unlawful act
17 and, to that extent, as has happened to date, I think
18 the fact that those acts occurred and what happened
19 is relevant.

20 Now, if questions or suggestions are
21 put solely to ascertain who did them, I don't know
22 whether we will --

23 THE COMMISSIONER: Who did what. You
24 mean who was the author of the dirty --

25 MR. BROWN: Who was the author.

THE COMMISSIONER: Yes, all right. Well,



1
2 the fact that somebody somewhere, no names, had put
3 marks on Mrs. Trayner's car and put --

4 MR. BROWN: Telephone calls, pills in
5 the salad.

6 THE COMMISSIONER: Pills in Mrs. Scott's
7 salad somehow or other has a bearing on, a pretty
8 remote bearing, on the cause of death.

9 MR. BROWN: Well, there is no
10 originality in our submission, we are merely following
11 the argument that Mr. Cooper made at the Preliminary
12 Inquiry.

13 THE COMMISSIONER: I am sorry, what was
14 his submission?

15 MR. BROWN: The events that occurred
16 in August, September and October were extraordinary
17 events.

18 THE COMMISSIONER: Yes.

19 MR. BROWN: They were of such a
20 character as to suggest that there was someone or
21 a group of people who were of such a character to
22 do things which would threaten perhaps the safety
23 of other people, that in face of the series of deaths
24 that had occurred, there might be a link between the
25 events in the fall and the events in the spring because
they both suggest that there was some unlawful act



1
2 occurring.

3 To that extent, it would be relevant
4 to determine what happened, where it happened and, as
5 I say, from our point of view, that is more an
6 argument that we would be making in Phase II but the
7 fact that they happened and the nature of the acts,
8 sir, would also be relevant because I think it does
9 have a nexus with the character of the deaths of
10 the children, that is, that they may not have been
11 accidental and may have resulted from an unlawful
12 act.

13 THE COMMISSIONER: Yes.

14 MR. BROWN: To that extent we would
15 submit that the areas should be factually canvassed
16 with any future witness, although, I sympathize with
17 Mr. Thomson's submission that questions, allegations,
18 confrontations which goes solely to suggest that
19 a particular person or a group of people committed
20 certain acts may well not --

21 THE COMMISSIONER: Well, if the - and
22 I am certainly not saying that it is relevant to the
23 cause of death - but if the dirty tricks were relevant
24 to the cause of death then surely if Mrs. Trayner
25 gives any evidence with respect to them she has got
to be cross-examined on the evidence she gives because



1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

if it isn't legitimate, these things didn't happen, then obviously they don't go to the cause of death and if they were done by one person as opposed to another that might conceivably have something, that might be of some assistance. My basic problem is I don't know whether it goes at all to the cause of death. That is where I am really at. You seem to think it does.

MR. BROWN: Well, it is also my understanding, sir, when the matter had been raised earlier you were of a different mind.

THE COMMISSIONER: What, that it went to the cause of death?

MR. BROWN: That it went to the cause of death.

THE COMMISSIONER: Well, I suppose I am entitled to change my mind. I never thought of that. I thought it was coming in as to identity, that was always my understanding. Nobody characterized it at the time.

MR. BROWN: Well, I would submit that although it may have some relevance to identity it also goes largely to the character of the act, the nature of the act.

THE COMMISSIONER: This takes place months



11

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

after these children died. How can it go to the character. All it goes to is perhaps somebody's opinion about the children dying perhaps to show some character trait of whoever did it, but how does that help on the cause of death?

MR. BROWN: The suggestions that have been made are the deaths are as a result of one or two things: natural causes or an unlawful act.

THE COMMISSIONER: Well, Mr. Labow doesn't agree with you, but go ahead.

MR. BROWN: Or negligence. To assist you in determining how to characterize the deaths, which I think is properly your mandate, evidence of accidental deaths on that ward at a certain period of time suggesting that although they weren't related to deaths but unlawful, improper acts were happening, may assist you in determining and characterizing the cause of death, that is, that it was more likely they were not caused by accidents but were caused by some unlawful act and it is on that basis that I submit they are relevant to Phase I. As I say, they are also relevant to Phase II but for a different purpose and aside from that, sir, we have no further submissions.

THE COMMISSIONER: Yes, all right. Well,



12 1 Mr. Hunt, you have an unlikely ally in Mr. Brown.

2 MR. BROWN: Well, sir, if I might.
3 The implication of your statement is that the Crown
4 has led the battle in disclosing these dirty tricks.
5 I would simply go on record as saying at the
6 Preliminary Inquiry of Susan Nelles it was the ability
7 and the forcefulness of Mr. Cooper that enabled these
8 events to come to light.

9 Mr. Hunt is certainly now making use
10 of that but to suggest that the genesis of the idea
11 rested with the Office of the Attorney General I
12 take some objection to that.

13 THE COMMISSIONER: I support you in
14 praising Mr. Cooper and we will send a copy of this
15 transcript to him.

16 Yes, all right, Mr. Hunt.

17 MR. HUNT: I won't risk any comment on
18 that, Mr. Commissioner.

19 In my submission the effect of the
20 Judgment of the Court of Appeal on the evidence on
21 Phase I is really not such that the great bulk of
22 the evidence you are required to refuse to admit and
23 it really comes about as a result of really the
24 nature of the issue that you have to decide.

25 You've got 36 deaths, you've got three



1
2 choices for each death based on the evidence to date:
3 You've got accident, you've got natural causes and
4 you've got foul play, or negligence I suppose, but
5 let's take foul play. You, at the end of this,
6 whatever you do about or can't do about identity
7 has been asked if you can to tell the Attorney
8 General and the public how each one of those children
9 died; in other words, you've got to make a choice
10 if you can on the evidence between one of those
three ways in which the baby died.

11 Now, if you have a death that you are
12 enquiring into and the person met their death by an
13 obvious act of foul play, a bullet or a knife in the
14 heart, then evidence of motive or identity doesn't
15 help at all on the question of how the person met
16 their death. But that's not what you're dealing with
17 and that's what makes this question totally different
18 for you. You are not dealing with just one case of
19 a death that you have to try and characterize, you
20 are dealing with 36 of them and that means that any
21 evidence that in any way is going to assist you in
22 characterizing those deaths, even though it may be
23 evidence of identity of the same person at the bedside
24 of each of those children at the critical time they
25 died, is going to be relevant to you in deciding



14 1
2 how you are going to characterize the death. As I
3 say, it wouldn't if it was one case and the cause of
4 death was clear, it goes to only one issue, but it
5 doesn't, it can't be separated, in my submission,
6 given the problem that you have to face.

7 That's why it wasn't argued in the
8 Court of Appeal that the restriction imposed by the
9 terms of reference on you required you not to hear
10 certain evidence. In fact, the opposite was argued
11 that you should hear all evidence that in any way,
12 in any way touches on the question of the cause of
13 death and in my submission that's what the Court of
14 Appeal really said at page 18 when they said, two-
15 thirds of the way down, that you are obliged to hear
16 all the evidence relating to the cause of death
17 of the children. That means however probative it is
18 on that issue, if there is some aspect of that evidence
19 that is going to in some way touch on the
20 characterization of those deaths then you have to
21 hear it.
22
23
24
25

- - - -



1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

18apr84
E
DMrc

It may be, as you pointed out,
you may arrive at a conclusion based on that
evidence in addition to characterizing cause of deaths
as to the identity of ~~someone~~ and you can't name
that person. But it doesn't, in my submission,
restrict your ability to hear it. As I say, our
position was that you hear all relevant evidence.
Mr. Sopinka's position was --

THE COMMISSIONER: Yes. All right.

MR. HUNT: Mr. Sopinka --

THE COMMISSIONER: I think I am
prepared to accept that proposition, but that really
is not much different a proposition than Mr. Lamak
put to me. But if it helps, presumably helps us
substantially, not just might conceivably help, but
if it helps in determining the cause of death of the
children, I shall receive it. You have to tell me
how the 'dirty tricks' help me in determining the
cause of death.

MR. HUNT: You see, the difference
is, the Court of Appeal has said to you, at page 18,
that you are obliged to hear all the evidence relating
to the cause of death.

THE COMMISSIONER: Yes.

MR. HUNT: They didn't say that it has



E2

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

to be substantially probative on the issue of cause of death.

THE COMMISSIONER: They did say, where did they say that I have a difficult task and where that difficulty arises, I should resolve it in favour of the citizen, the person whose civil rights might be affected. So, I do have to consider that, do I not?

MR. HUNT: In my submission, your primary consideration is, is this evidence evidence that relates to the cause of death.

THE COMMISSIONER: Yes. I will accept that.

MR. HUNT: And if you conclude that it is evidence relating to the cause of death, given what you were asked to do and given that the restrictions imposed on you had nothing to do, in my submission, with the evidence that you are to receive, then once you have decided that it relates to the cause of death, then you are obliged to hear it.

THE COMMISSIONER: No matter how tenuous that relationship is?

MR. HUNT: If it relates to the cause of death, then you are obliged to hear it, that is my submission.



E3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: Any kind of
relationship?

MR. HUNT: You see, where this has
gone off - I shouldn't say where this has gone off
the rails, or where we are not ad idem --

THE COMMISSIONER: Do you want me to
give you my views?

MR. HUNT: No, please. No. You
are considering a very unique situation. We all tend
to think of cause of death and how you characterize
the death as foul play, or accidental, or natural causes
in terms of one death, but you have 36 of them where
you have three choices and you have got -- there could
be any one of a number of things that are going to
help you characterize those deaths. It might be just
evidence of motive, for example. If nobody had a
motive at all, then that is relevant evidence going
to the cause of death. However, if somebody had a
motive for killing 36 children, whatever it might
be, mental instability or anything, then that is
relevant evidence that helps you or goes to the issue
of, how do I characterize these 36 deaths, how do I
make the choice.

THE COMMISSIONER: I am getting ahead
of myself. Supposing we discover that someone did have



E4 2 a motive, what do I do in the report?

3 MR. HUNT: Your report is a different
4 matter. You have been told that if you come to the
5 conclusion that one or more babies were killed by an
6 overdose of digoxin given to them deliberately, that
7 you can't name the administrator.

8 THE COMMISSIONER: But I can
9 apparently say I have decided these children were all
10 killed deliberately because 'X' had a motive for
11 doing so, isn't that so?

12 MR. HUNT: Well, no, you are asking
13 me in the absence of the evidence to say to you, how
14 would you frame your report.

15 THE COMMISSIONER: Yes.

16 MR. HUNT: That is nearly as impos-
17 sible a task as the one you have been given. There
18 is an area in there where any one of a number of
19 positions can be taken by you in your report. Some
20 of them are going to be so close to naming the
21 individual, that it is going to in effect attach a
22 criminal responsibility to them. Others will be so
23 far away from that that they will be virtually meaning-
24 less. There will be a middle ground, in my submission,
25 and that is where the extreme difficulty that you are
faced with comes in; that you have to select, which



E5 1
2 goes as far as you can in giving a full report of the
3 evidence of that issue to the public without doing an
4 injustice to the person that you concluded had the
5 motive.

6 I appreciate that is not particularly
7 helpful to you, but in the absence of sort of having
8 the evidence and the individual, it is difficult to
9 construct a phrase or a sentence that could accurately
10 capture that and yet would not violate the spirit of
11 the judgment of the Court of Appeal.

12 So, in summary, on that point, I
13 suggest the nature of this -- the reason why it was
14 not argued that you are restricted in the evidence or
15 that the Court of Appeal, in my submission, has said
16 it is, is because of the nature of the task you have.
17 Many more things are going to be relevant and touching
18 on the cause of death where you are faced with three
19 choices in a multiple death situation, than would be
20 if you were faced with one death where it was obviously
21 foul play and you are hearing evidence, then that
22 might only go to identity and not assist you at all.

23 Now, my friend -- well, let me
24 pick up on that. I was going to deal with the 'dirty
25 tricks' at the end, but --

THE COMMISSIONER: No. You can deal



E6

1

2

with them any way you like.

3

4

5

MR. HUNT: No. It would help, I think, at this point to pick up on that, because I think it makes my point.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

You are enquiring into 36 deaths at a major hospital over a nine-month period, and as I say, you have one of three choices with respect to each. It is open to you on each of them to decide if there was foul play involved. Now, within three months or three to five months, depending on the evidence of Mrs. Scott when she first received the first series of phone calls from someone who did not say anything but hung up, but certainly in that time period, somewhere between June and August, there are a number of really absolutely extraordinary incidents occur with respect to people on the same team, as is the subject matter of much of the speculation. Those incidents involve threats of death. More importantly, they involve somebody giving an unprescribed, unauthorized dose of medication to two nurses in their food.

Now, stepping back, we can say, to have a series of 36 deaths, some 29 of them are suspicious, in a hospital ward over a period of time is an extraordinary event and, thankfully, it is



E7 1
2 something we don't see happen very often. If on the
3 same ward within a maximum period of five months you
4 have another set of extraordinary events that one
5 not only doesn't see very often, I suggest has never
6 seen before, if anybody can give me an example of that
7 sort of thing happening in a hospital, then it may
8 well affect the strength of this argument, but I
9 suggest there is no example to give. So, on the
10 same ward, in the same hospital, within five months
11 another series of extraordinary events happen. They
12 are not just extraordinary in the abstract; they are
13 extraordinary because they involve threats of death
14 to two of the nurses on the same team that were
15 involved with the babies that are under consideration.
16 In addition to that, they involve, as I say, in one
17 instance, in more than one instance, somebody putting
unprescribed medication, a heart medication into their
food.

18 Now, the nexus between those two
19 sets of extraordinary events, in my submission, is not
20 just one of time. In a three to five month period, I
21 say it is certainly a nexus in time that is probative,
22 but in the character of the events that occurred.

23 To look at 36 deaths on that ward
24 and then not look at another series of extraordinary
25



E8

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

events that occurred in that period of time of the same character, in my submission, is not to look at probative evidence on the character of the cause of death of those children. I think that is what my friend, Mr. Brown, was submitting to you that you may decide, it may assist you to decide which of the three choices you are presented with on the evidence of the 36 deaths to make, to know that apparently someone connected with the Hospital, if not with the ward, if not with the team, was within a brief period of time after the last death involved in this extraordinary conduct, certainly threatening two people's emotional stability if not their physical well-being in terms of the unprescribed, unauthorized doses.

So, in my submission, there is an example of evidence which may well go to the question of identity but is certainly, in my submission, probative on the issue of how and by what means they died.

If you were to decide, or if you were to be faced with a case where the evidence was such that at this point in time you were able to say, no, those 36 deaths resulted from foul play, no question about that, the evidence is consistent, unanimous with that, then the argument about this



1
E9 2 evidence of the 'dirty tricks' could not be made
3 because it wouldn't assist you; you have already
4 decided that 36 children had bullets in their hearts
5 and it is obvious that they died. The only possible
6 relevance of this evidence is as to the identity
7 and then the argument changes, but it is not the
8 case, and the reason why it is not is because of the
9 nature of the exercise you are involved in and the
evidence that has to be considered.

10 Now, in closing, my friend, Mr.
11 Thomson --

12 THE COMMISSIONER: Did you say, in
13 closing? What about these other things before you
14 close?

15 MR. HUNT: Well, I assumed --

16 THE COMMISSIONER: You assumed that
17 all would be well on the other questions?

18 MR. HUNT: I assumed that the hardest
19 problem I had was the one that I just addressed, sir.

20 THE COMMISSIONER: What about the
21 conflict between the nurses?

22 MR. HUNT: Well, all right, it all
23 falls under the same umbrella as I have just argued,
24 except it may be that the nature of the evidence on
25 each of those issues is such that it is not -- while



E10

1
2 probative on the question of cause of death, it is
3 not as probative as something like the 'dirty tricks'
4 incident that went on in August, because you are,
5 at this point, unable, on the basis of the evidence,
6 to say, you know, we have decided already that these
7 deaths are as a result of foul play because of the
8 nature in which they occurred. Any evidence that
9 goes to show motive on the part of some person
10 connected with the ward or a disposition, which, I
11 suppose, is really saying the same thing, is going to
12 be evidence that relates to the cause of death. Now,
13 it may not relate to it in as direct and dramatic a
14 fashion as the 'dirty tricks' does, but in my
15 submission each of those pieces of evidence that is
16 under consideration here is something which is relevant
17 to the question of the characterization of the deaths.
18 I go back to the reason that I suggested at the
19 outset; it is because you are confronted with one of
20 three choices in respect of each death. Anything that
21 makes accident less likely makes foul play more likely.
22 You, in my submission, ought to receive that evidence
23 for the assistance that it might give you on that
24 very important question, and I submit that is the
25 most important question that you are asked to decide;
how and by what means the children --



1

E11 2

THE COMMISSIONER: It is the only question, isn't it? Is there another question?

3

4

5

MR. HUNT: Well, it certainly is -- well, we are into -- well, I will save my submissions on Phase II for another time.

6

7

THE COMMISSIONER: Yes.

8

9

10

11

MR. HUNT: You are quite right, at this point, it is the only question that you have to decide at this stage of the Commission. So, in my submission, my argument applies to all of those issues.

12

13

14

THE COMMISSIONER: Well, the things like Miss Frise can get her digoxin at the drugstore, is that a matter that goes to the cause of death?

15

16

17

18

19

20

21

MR. HUNT: Well, it goes perhaps to assist again in the characterization inasmuch as you go back to the question of identity. You can't name an individual but you have evidence in front of you that suggests the same individual was on the ward at the time each death occurred. Now, that is evidence which, in my submission, clearly is evidence of identity but it goes to assist in characterization.

22

23

24

25

Now, Miss Frise's evidence was not, as we know, that just she was the one who went and attempted to get digoxin over the counter at the



E12 1
2 drugstore; she went with Mrs. Trayner. In my sub-
3 mission, what you can do in your report in terms of
4 identity is a very different matter from you listening
5 to all of the evidence that may assist you in character-
6 izing these deaths, and then coming to a conclusion
7 based on that evidence as to how and by what means
8 the children met their deaths and then treating the
9 question of your reporting on the evidence that may
10 go to other issues as a separate matter in your
11 report.
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EMT.jc
F1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COMMISSIONER: Well, what you are saying is that they are all relevant to the --

MR. HUNT: I am saying that they all touch on the question of characterization of deaths and if that was not in issue, and if what we are looking into was a case of obvious foul play, then the argument couldn't be made because then those matters of evidence would simply go to the issue of identity and the argument would of necessity change.

THE COMMISSIONER: Yes.

MR. HUNT: Now in closing, my friend Mr. Thomson has again referred to cross-examination by myself and counsel for the Police, and I take him to have gone so far as to say to you that initially simply myself and Mr. Percival do not have the right to challenge Mrs. Trayner's evidence in cross-examination.

THE COMMISSIONER: Well, I think once it was put to him he said no one had.

MR. HUNT: Yes.

THE COMMISSIONER: He wasn't playing favourites.

MR. HUNT: That is right, so now we are all in the position in Mr. Thomson's submission that we do not have the right to challenge



F.2

1
2 Mrs. Trayner's evidence in cross-examination.

3 Now he didn't go so far as to say to
4 you that is what the Court of Appeal had said to you,
5 and I suggest the reason is because it is clear they
6 didn't say that at all, and that proposition, as
7 you suggest, is an outrageous one.

8 If that is the situation then I
9 suggest we all might as well go home right now because
10 there is no point in you taking evidence from a
11 witness and being bound to accept what that witness
12 says without anyone challenging the evidence in
cross-examination.

13 Now Mrs. Trayner started off by
14 saying that she didn't administer digoxin to any
15 children. One of the questions that you have to decide
16 is cause of death, and in fact Mr. Thomson says, you
17 are bound to accept that answer and any other answer
18 she gives without anyone testing it on cross-examination.
19 In my submission, that, if that is the case, results
20 in the whole thing being a futile exercise, and as
your Lordship has pointed out, an outrageous one.

21 I can indicate that I am certainly
22 prepared to deal with questions that I ask on a
23 question by question basis and objections my friends
24 may take to the way in which I phrase the question
25



F.3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

or the form of the question, but if there is to be a ground rule at the outset that none of the questions can be such that they challenge what the witness has said, or in effect touch her credibility, I think we should know that right off the bat before we go any farther because that would make quite a difference in how we proceed.

THE COMMISSIONER: Yes. All right.

Thank you.

Mr. Percival?

MR. PERCIVAL: Mr. Commissioner, you will appreciate as you hear some of my comments I may take a different tack than those of you in the front row who have already come before me, but may I tell you on behalf of the Metropolitan Toronto Police Force that we join with you in being troubled with the Decision of the Ontario Court of Appeal.

Since last November when submissions were requested by you, Mr. Commissioner, on this issue, my clients have consistently contended that the provisions of the Order in Council entitled you to name names if you were able to do so.

We have contended before you, we contended again before the Divisional Court, and lastly before the Court of Appeal that your Commission



F.4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

was created for two very important reasons: it would seem really to satisfy the needs of 72 parents in Ontario to know the circumstances under which their 36 babies came to their death, and secondly to restore the reputation of The Hospital for Sick Children and the many dedicated doctors, nurses and others on its staff.

(2)

A further aspect of your Inquiry which you have designated as the second phase requires you to inquire into, determine and report on the circumstances surrounding the investigation, institution and prosecution of certain charges arising out of four of the deaths.

The Orders in Council made it clear, Mr. Commissioner, that you were required to make a full examination of these matters so as to ensure full public knowledge of the completeness of the matters referred to in the Terms of Reference.

I submit to you in order to make a full examination of the matters you should be entitled to hear and report on all relevant evidence relating to the cause of death, investigation by the Police and the prosecution by the Crown. And as one views the limitations placed upon you by the Ontario Court of Appeal at page 18 of the Reasons, you are obliged



F.5

1

2

3

4

5

to hear all of the evidence relating to the cause of death of the children, and this would include evidence which would tend to show that one or more of them died as a result of unlawful or negligent acts.

6

7

8

9

10

11

12

13

My difficulty with that comment at page 18 of the Judgment of the Court of Appeal is how you are supposed to determine whether an act has been either unlawful or negligent unless you can inquire into and hear evidence as to who was present, what medication was prescribed, what medication was not prescribed, the terminal events and the likelihood as to the method of administration of digoxin if that be the cause of death.

14

15

16

From the outset my clients have been concerned with the needs of 72 parents to know how and under what circumstances some of these babies came to their death.

17

18

19

20

21

22

23

24

25

In some cases up to now the Commission has heard from numerous witnesses who with a series of "I don't know", "I don't recall", "I don't remember" have forced you to resort solely and simply to the medical charts of these babies for any information as to how they died and why they died, which may be very little solace to many of the anxious parents out there.



F.6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

We have thus far heard two days of evidence of Phyllis Trayner about a number of the baby deaths, except the last three as I recall, Gardner, Miller and Cook, and by and large, without trying to unfairly categorize her evidence, and of course without it being tested by cross-examination, she has not really added to the information already available to you.

You may very well never be able to come to a conclusion as to the perpetrator if you find there were any deaths caused by an overdose of digoxin.

Phyllis Trayner is ostensibly the last major witness who you will hear in Phase I. If you restrict the avenues of either examination by Mr. Lamek and cross-examination by other counsel as you have indicated you might on Monday, I suggest that would be grossly unfair to both Phyllis Trayner and all of the witnesses who you have heard from before this.

To do so would provide to this witness, Phyllis Trayner, a questionable advantage over other nursing witnesses, including Nurse Susan Nelles. I suggest to you, Mr. Commissioner, if you agree to be bound by the terms of the Judgment of the Ontario



F.7

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Court of Appeal and your counsel and yourself not pursue your right to seek leave to appeal to the Supreme Court of Canada and then restrict the avenues of examination and cross-examination with this last major witness in Phase I, then a number of rather unfortunate consequences are inevitable.

Some of those consequences may come as a shock to some of those people who have contended that you should not name names, but an innocent world renowned institution, The Hospital for Sick Children, may never be able to be exonerated by your report. Innocent employees, including many dedicated doctors, residents, interns, nursing supervisors, registered nurses and registered nursing assistants, cannot be exonerated by your report. Seventy-two parents of the thirty-six babies may be no further ahead than they were at the beginning of this Commission as to why and under what circumstances their children died.

You also referred on Monday to the serious limitations this Court of Appeal Decision may have on the nature of your Inquiry in the last or second stage of the Commission.

Considering that there still is pending



F.8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

a Supreme Court action brought against the Metropolitan Toronto Police Force, Staff Sergeant Press and Sergeant Tony Warr by Susan Nelles for malicious prosecution, the receiving of evidence and the findings of this Commission in the second phase have more than just passing interest to my clients.

Back in November we well recognized that to submit that you had the right to name names might very well subject the Metropolitan Toronto Police Force to closer scrutiny in their investigation of this matter. That very distinct consequence did not deter the decision of my clients to press for the fullest and most complete investigation by this Commission as to the circumstances surrounding these tragic baby deaths.

The Metropolitan Toronto Police Force no less than the Attorney General certainly has the obligation in this community to serve and protect the rights of all persons. The Force and all its officers at the beginning of this Commission welcomed the opportunity to explain fully to this Commission, the public in general, what investigation they conducted and the circumstances under which it took place.

However, we agree with your comments on Monday that if it be your decision that you are



F.9

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

bound by the Judgment of the Ontario Court of Appeal then you are not entitled to inquire into the appropriateness of the conduct of the Police in their investigation because to do so would be irrelevant.

As you pointed out on Monday, evidence that might result in an adverse finding as to the actions of the Police would be tantamount to a conclusion of civil liability which finding you are prohibited from making by the terms of the Order-in-Council. I suggest to you, Mr. Commissioner, this is a result that is not welcomed by the Metropolitan Toronto Police Force, and that surely cannot be a result which will find favour with many of the witnesses who have given evidence before you.

In many cases you have concluded, after hearing the evidence I suggest that an individual was innocent of any wrongdoing, whether negligent or deliberate, yet you are not free to so report. Similarly, you cannot inquire into whether the Police acted in an appropriate manner in their police investigation and the subsequent charging of Susan Nelles.

What the Court of Appeal has ruled appropriate and fair in the first phase of your



F.10

1

2

Inquiry surely must extend into the second phase.

3

4

5

6

7

I suggest to you, Mr. Commissioner,
that there are four avenues presently open to you:
the first, and the one that I urge upon you, is that
through your counsel you should seek leave to appeal
to the Supreme Court of Canada as to the Judgment of
the Ontario Court of Appeal.

8

9

10

11

12

13

14

15

16

The Metropolitan Toronto Police Force
will support such an appeal. While that appeal is
pending you should not restrict the right of
examination or cross-examination of the remaining
witnesses. If your counsel and the interveners are
successful on that appeal, then no time will have been
wasted. If the appeal is unsuccessful, then while
you have heard all the evidence your ability to make
findings of fact in your report will be severely
restricted, but again no time will have been wasted.

17

18

19

20

21

As you know, Mr. Commissioner, my
clients are merely interveners in these proceedings,
and my understanding of the law is that you, the
respondent, have the only right to appeal. The
intervenors including the Police and the parents,
have no status to do so.

22

23

24

25

On behalf of my clients --

THE COMMISSIONER: I am not sure of that.



F.11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Is that right?

MR. PERCIVAL: Well, with respect, the law is not clear in relation to that.

THE COMMISSIONER: But surely the Supreme Court of Canada can give leave to anybody it likes to appeal.

MR. PERCIVAL: Well, Mr. Commissioner, I would think that the intervener who is neither appellant nor respondent can't drag the appellant and respondent before another tribunal.

THE COMMISSIONER: Well, you realize the practical problem about an appeal?

MR. PERCIVAL: I concede that; that is why I am saying while it is pending, Mr. Commissioner, you can still continue to hear evidence.

The second alternative which is --

THE COMMISSIONER: That is not the practical problem I am concerned with. The practical problem is timing.

MR. PERCIVAL: I am well aware of that, Mr. Commissioner.

THE COMMISSIONER: Yes. All right.

MR. PERCIVAL: The second alternative which is far less preferable is that you now seek clarification from the Ontario Court of Appeal as to



F.12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the meaning of their Judgment. With the greatest respect, if you try to follow their present direction your task will not be merely approaching the impossible, it will be impossible, and the report you are required to write under that terms, under the terms and conditions set out by the Court of Appeal will be virtually useless.

THE COMMISSIONER: I'm sorry, are you talking here about Phase I or Phase II?

MR. PERCIVAL: That is in both cases.

THE COMMISSIONER: Well, once again --

MR. PERCIVAL: Mr. Commissioner, because, you know, Mr. Lamek says well, we shouldn't be talking about Phase II. What you are going to be doing has absolutely very important implications.

THE COMMISSIONER: Oh, I know. It is an enormous problem.

MR. PERCIVAL: And I don't want somebody at some later stage to say we take one position in Phase I and now the ground rules change. I want to make it very clear to you, sir --

THE COMMISSIONER: Well, the Court of Appeal might or might not, but I would think probably would not receive them because that was not the stated case.



F.13

1

2

MR. PERCIVAL: I understand that.

3

4

THE COMMISSIONER: It wasn't on
Phase II. It was only on Phase I.

5

MR. PERCIVAL: I understand.

6

7

8

9

10

THE COMMISSIONER: They will say we
did what we were asked to do and now you want us to
do something else without having the benefit of the
Divisional Court's ruling on it, without having the
benefit of - well, presumably they could have argument,
but do you really think that they would say --

11

12

MR. PERCIVAL: They would probably say
to you, Mr. Commissioner, you are the Commissioner --

13

14

THE COMMISSIONER: Figure it out
yourself.

15

16

MR. PERCIVAL: -- you must make the
decisions as to the evidence. Yes, I understand. That
has a very distinct limitation.

17

18

THE COMMISSIONER: It is not fair
because they have got all kinds of help!

19

20

21

22

23

24

25

MR. PERCIVAL: The third alternative,
Mr. Commissioner, is that you seek an amendment to
the Order in Council from the Attorney General in
order to clarify your mandate. Such an amendment may
permit you to finish in a fair and complete manner
this very meaningful investigation into the unfortunate



F.14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

deaths of 36 babies. Whether he will in fact change the Orders in Council --

THE COMMISSIONER: I can tell you now if Mr. Hunt has any influence with him he certainly won't change the terms of Phase I. He might, of course, consider Phase II. What would you say about that?

MR. PERCIVAL: Well, Mr. Commissioner, I can't believe that the rights of any witnesses, any person at The Hospital for Sick Children, should be any higher or any lesser than the Police.

THE COMMISSIONER: What would you say to asking - we are not arguing Phase II yet.

MR. PERCIVAL: I understand.

THE COMMISSIONER: But since you brought it up --

MR. PERCIVAL: Well, Mr. Commissioner, it is not merely of academic interest. I am looking down the gun barrel of a Supreme Court action for in excess of \$800,000, and that that very issue is before is canvassed in the pleadings in that lawsuit.

THE COMMISSIONER: Let me just ask you this: what is your position if the Attorney General would amend Phase II but would not amend Phase I? You don't want it; is that it?

-



BM/LN

1

2

MR. PERCIVAL: Well, all I am

3

saying is what's fair in the first phase should be

4

fair in the second phase.

5

THE COMMISSIONER: All right.

6

MR. PERCIVAL: Now the last alterna-

7

tive is the alternative that I gather that your

8

Counsel is now advocating to you, is that you

9

proceed ahead, accept the decision of the Court of

10

Appeal and the restrictions contained and you continue

11

to hear all relevant evidence and then you would

12

decide on the propriety of cross-examination and it

13

would have to be dealt with on a question by question

basis.

14

Now, I have read with interest Mr.

15

Thomson's opening lines and I have heard his

17

submissions today. I submit without getting into it

18

how one cross-examines surely should be ruled upon

19

when it occurs not before it occurs and I am not

20

going to be concerned at this stage by the warning

21

in in effect that he has conveyed in his

22

opening lines as to what Mr. Hunt or myself or any

23

other Counsel in this room should do in cross-

24

examination.

25

I say to you in relation to the

individual matters of evidence, the dirty tricks



1
2 evidence will not be canvassed by me, so, that is
3 not a concern to me.

4 If one accepts the decision of
5 the Ontario Court of Appeal I do believe that the
6 conflict between the nurses probably is irrelevant
7 because it only goes to the question of identity.

8 Now, the evidence involving
9 Meredith Frise and the drug store, while it is
10 interesting, one would think that the evidence tends
11 to then show that if it was available in drug stores
12 the perpetrator might be from outside the hospital,
13 the evidence is very clear that digoxin was not
14 locked up and available to everybody within the
15 hospital during that nine month period. So, what real
16 effect has it for your consideration.

17 I say to you in conclusion Mr.
18 Commissioner, if you proceed on the basis of
19 accepting the ruling of the Ontario Court of Appeal
20 my clients want you to well appreciate that the
21 second phase of this enquiry, if in fact it does
22 proceed, may be very short indeed.

23 Thank you.

24 THE COMMISSIONER: Yes, thank you.
25 I think perhaps we should take 20 minutes now.
-- (Short recess)



3
1
2 -- (Upon commencing)

3 MR. SHANAHAN: Mr. Commissioner,
4 I know that Mr. Scott on behalf of the hospital
5 was perhaps next in line to give his submissions.
6 Once again, I've got other commitments closing in
7 on me and would you greatly mind if I spoke out of
8 turn.

8 THE COMMISSIONER: Yes. That
9 certainly gives us a chance to get even with Mr.
10 Scott, doesn't it.

11 MR. SHANAHAN: Well, sir, our
12 position here, or at least my position on behalf
13 of the parents that I represent really would
14 roughly be to the same effect Mr. Hunt and Mr.
15 Percival have put before you. I think if I might,
16 sir, and it won't take me a minute here --

15 THE COMMISSIONER: They take
17 quite different tracks.

18 MR. SHANAHAN: If I might sir
19 just in terms of the back drop as to how my
20 families, those that I act on behalf of, feel and
21 have reacted to it and why therefore sir we take
22 the position that we do take. When they first got
23 the Order in Council and read it and in laymen's
24 terms responded to it, they felt as you subsequently
25 felt that in fact it was going to tell them how and



4

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

by what means their child died and that in spite of the limitation that was also put in there about civil and criminal responsibility that in fact if you saw on the evidence, and only if you saw on the evidence, that you could name a name that that name would be named.

You subsequently sir interpreted it that we and in fact the first Court that heard the appeal on the matter, the Divisional Court, also agreed.

If it unfortunate but I don't think the blame lies anywhere that at this late hour here with the last witness of that nursing team almost through her evidence that in fact the rules of the game, if you like, have been changed. I must say that on behalf of the families I represent that the result for them has really been devastating and has been extremely distressing and upsetting. They are not, I wish to emphasize, sir, casting about for an accused and there would certainly be no joy in their life if someone was named.

It is more to the point that they are reacting to, not that you in the future couldn't have seen on the evidence who might have done this, but in fact you would be legally restrained at the



1
2 end of all of this scientific evidence and really
3 evidence here of a nature that was never before His
4 Judge Vanek that in fact you then would be legally
5 restrained from mentioning that name.

6 So therefore, sir, the point from
7 which I depart is that really where Mr. Percival
8 also picked up upon and that is we urge you
9 strongly, as we perceive our position as interveners
10 are such that we may not be able to take the
11 impetus here with an appeal - I leave that open -
12 for further study but that being as we on first
13 blush see it urge you strongly sir, that it was
14 obviously an opinion you strongly held, it was an
15 opinion that at least one other Court supported you
16 in , that you do take this matter further and in
17 fact sir you appeal it so that we are clarified
18 once and for all exactly what your powers are.

19 I think you would agree, sir, that
20 the Commission as perceived before the Ontario
21 Court of Appeal ruling and now after it is a
22 vastly different thing in your exercise, even on
23 stage one, not just phase two is vastly different.

24 So, sir, that is first of all.

25 With respect to the evidence, I
think a point here Mr. Hunt said it and I am not so



6

1
2 sure I can say it greatly, but since these deaths
3 sir, the number of the deaths is outstanding, is
4 enormous, but as well as that sir the complexity of
5 the deaths, the subtlety of the manner of their
6 deaths and how they died require and almost demand
7 sir that there will be, it will admit, of no easy
8 solution here, be it negligent line or be it the
9 deliberate line. Many pieces of evidence sir will
10 collaterally speak to identity but with respect
11 nearly all of them, and the only one that I
12 really find very difficult to justify you receiving
13 is that evidence of Meredith Frise with respect to
14 perhaps purchasing of the di,oxin. But all other
15 pieces of evidence sir with respect have a dual
16 heading or a dual purpose to them. They may
17 collaterlally speak to identification but with
18 respect nearly all of them as I examined them, sir,
19 had something to say and something to advance that
20 whole area which fortunately is still left to us,
21 appeal or no appeal, and that is whether they were
22 negligent, whether they were accidental or what have
23 you. Every one examined sir got into a broader
24 area as, were there people with motive, were there
25 differences which these deaths could be the upshot
of, were there so many at such a shift at so many



7
1
2 similar times that when you get a child who may have
3 what you might call neutral toxilological evidence
4 here or toxilological evidence which in itself
5 not indicative one way or another, that that child
6 perhaps participating sir in so many other features
7 of that wide mass of evidence may lead you sir to
8 say that child did not die as a result of negligence,
9 that in fact it was part of a broader pattern and
perhaps was as a result of foul play.

10 That's why so many smaller pieces
11 of evidence which at first blush may appear to be
12 tenuous, with respect sir the accumulative effect
13 of those smaller pieces of evidence at the end of
this Commission may well have you put some babies
out of the category of just negligence and into the
category of foul play.

14 Sir, I would submit to you here
17 that as well as that it is completely relevant, it
18 is extremely relevant to the terms of the character-
19 ization of deaths with respect to the area of dirty
20 tricks. I know that at first glance you may say
21 that they simply go to the matter of identity. With
22 respect, when you examine the factors that those
dirty tricks, especially as they increase and come
23 to a crescendo there really with the drugs, heart
24
25



8
1
2 drugs administered, an attempt to have them
3 administered to another nurse, those nurses
4 partaking of the same nursing team and it being
5 done sometime later, with respect, it shares so
6 many characteristics of the vary nature of the
7 deaths that we are studying that with respect there
8 is a nexus in time there's a nexus in the character
9 of the acts that they too must be delved into.

10 Now, I admit you put in a question,
11 sir, an issue that doesn't admit of easy answer and
12 that is what if it does get to the point where in
13 fact, as you put it, a five year old could gather
14 who indeed had administered that drug. Well, sir,
15 that really is the difficulty with the ruling and
16 that is difficult and that returns to the point
17 from whence I departed and that is that really it's
18 not so much clarification that is sought because I
19 think the Court of Appeal would turn to you and say
20 clarify it as you might, that is your job. It is
21 really an appeal that is required and that is where
22 the clarification will come, sir.

23 Finally, I think others have
24 reacted to Mr. Thomson's desire that you prohibit
25 any cross-examination. I think I have gathered your
reaction to that and I think it would be completely



1
2 unacceptable that this last penultimate witness of
3 you like on that nursing team really would be allowed
4 to give examination or give evidence in chief and
5 then we would be proscribed from cross-examining her,
6 I think you have said that that would really be
7 unacceptable.

8 I do agree that on an ad hoc basis
9 question by question, there certainly may be objections
10 put by Mr. Thomson.

11 So, that is my position, sir.

12 THE COMMISSIONER: Thank you.

13 Mr. Scott?

14 MR. SCOTT: Mr. Commissioner, I
15 have two preliminary matters and then I want to
16 make two or three submissions on the question that
17 is before you.

18 First is I hope you will accept
19 just this once at least the advice of your Counsel
20 that the considerations inherent in this Order
21 for phase II will be dealt with next week or at
22 a later stage. It is true as Mr. Percival observes
23 that the same Order will have an effect on both
24 phase I and Phase II but that the considerations
25 are different. I think we have enough work on our
plate to determine the manner in which you can



1
2 proceed in Phase I which we should do in the
3 interestsof Mrs. Trayner as well as everybody else
10 4 as soon as possible and that therefore you will not
5 expect or want me or anybody else to reply to the
6 observations about Phase II now.

7 The second matter is just a
8 practice note, as they used to say, and that is if
9 the Metropolitan Toronto Board of Commissioners of
10 Police want to appeal from the Order of the Court
11 of Appeal and lack only a precedent I will be glad
12 to provide them with a number of precedents in which
13 intervenantstatus granted to participants before
14 boards and tribunals has been sufficient to
15 justify leave to appeal in the Supreme Court of
16 Canada. Knowing he may well want to act on that
17 I tell Mr. Percival that if his clients are really
18 serious and not just speaking here for the effect,
19 that the next leave to appeal day is April 30th
20 and if he wants to make the application, or if his
21 clients do so, we can provide any precedents that
22 he requires.

23 For our part the hospital --

24 THE COMMISSIONER: Do you provide
25 Counsel as well?

MR. SCOTT: I beg your pardon?



11

1

2

3

THE COMMISSIONER: Do you provide
Counsel as well?

4

5

6

7

8

9

10

11

MR. SCOTT: Oh, I don't think they
need that. For our part at the hospital we are
content with the decision of the Court of Appeal,
although it did not adopt the submissions, rather
different than other submissions were made that we
made to it and we believe you can carry forward
your mandate to a conclusion that will be in the
public interest in line with the determination that
the Court of Appeal has made.

12

13

14

15

16

17

The first observation I make is to
ask you to reflect more generally than we as lawyers
tend to do about what it is this Order in Council
was designed to accomplish. It goes without saying
that it was passed at a time when the hospital, a
great public institution had been confronted by a
series of absolutely extraordinary events.

18

19

20

21

22

There had been a preliminary
enquiry which concluded that there was foul play
but made no committal and there was real concern
in the public mind, and the public has a right to
know about many of these matters about what went on
at the hospital during that period of time.

23

24

25

The commission in my respectful



12 1
2 submission was established to serve two purposes,
3 not one. The second purpose was to permit you,
4 if you could, to make a report about what went on
5 and that is what is vexing us, today the extent to which
6 your report can be made.

7 The first purpose and perhaps in
8 the long run the most important purpose was to give
9 the public of this Province a window into the events
10 at the Hospital for Sick Children during that six
11 month period. So that even if you could draw no
12 conclusions or you could make no meaningful report
13 the members of the public who support this hospital
14 who use it would be able to draw their own
15 conclusions by seeing all those participants in the
16 events examined and cross-examined and that's why
17 you, sir --

18 THE COMMISSIONER: That's pretty
19 dangerous, isn't it, to have no conclusion but
20 from the person who is presiding and to have the
21 public who naturally have other things to do in life--

22 MR. SCOTT: I fortify my
23 conclusion on the words that you used on the very
24 opening day when you indicated that for example the
25 media would be given unlimited access to this enquiry
and the reason given at that time among others was



13

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

that no matter what the report said, and that would
be for you to decide at the end of a very long
exercise, it was important that the public have
access to this enquiry.



18apr84
H
DMrc

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COMMISSIONER: I am still of that view that it is important that they have, but no one can expect any member of the public, or perhaps the odd reporter who has been here all the time, and there are lots of reporters who apparently - not lots, but it seems there is one at any rate who isn't here and still gives his view on it. But that is -- surely an inquiry wants to have some kind of an answer from the man presiding; they may not like the answer they get but, surely, that is the purpose of having an inquiry.

MR. SCOTT: One purpose cannot exist without the other. Both purposes are legitimate. It is true that the press are surrogates for the public in the sense that they observe and report on it, but both are important. Now, all I say is that both purposes can now be served. All that the Court of Appeal has said is that, in your reporting function, you must have regard for the civil liberties of individuals and that, specifically, you shall not name names.

Now, I am well familiar with the sensation of clients who lose a case and come running to me and say, like Chicken Little, that the sky is falling, and you say, no, no, it is not that bad; just



H2

1

2

3

4

look at what they have said; don't get excited because you have lost the case; just look at what they have said.

5

THE COMMISSIONER: Are you comparing your clients to me?

6

7

8

9

10

11

12

13

MR. SCOTT: No. What I emphasize now is that there was no attempt made in the Court of Appeal or by the Court of Appeal to limit the ambit of this inquiry. What there was was a determination that, in making your report, it would not be within your Terms of Reference to name names because that would impose in effect a civil or criminal liability on individuals and be inconsistent with our notion of how their civil liberties should be protected.

14

Now, I accept that general proposition.

15

16

17

18

19

20

Now, what does it mean? What it means essentially is this: If you look at what the Court of Appeal said, you will see that they do two things. They first of all encourage you to hear all the evidence as you judge it to be relevant, and they spell out in the second place a limitation on your report.

21

22

23

24

25

Now, when we were in the Divisional Court and when we were in the Court of Appeal, no one, Mr. Strathy, Mr. Sopinka, suggested that there should



H3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

be any limitation on the evidence that you would hear. Indeed, on the second day in the Court of Appeal, when the Court convened at 10:30, that question was specifically put, as I recall it, to Mr. Sopinka, and he said that he did not intend to ask for any restriction on your right to call evidence, or any restriction on your right to find facts. What he was contending for was that the civil liberties of his client constrained you not to make a name in a report public. That was the position of Mr. Sopinka.

Mr. Strathy and his associates took no objection to that statement, and Mr. Sopinka was put forward by them as the lead counsel. The nurses took no objection to that statement, and the assertion that the evidence should now be constrained was simply not a matter that the Court of Appeal had to consider.

Now I know, I understand that you may not want to go to the trouble, quite wisely, of hearing evidence that you will not be able to utilize in your report, and that is a legitimate and proper consideration. But let us put aside the assertion that the Court of Appeal has imposed any constraint on you at all in that regard, and any counsel who say it has simply either were not present for argument in the case or have misread the Reasons for Judgment. If



H4

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

you look at the Reasons for Judgment, at page 18,
about ten lines from the bottom:

"The Commissioner is obliged to
hear all of the evidence relating
to the cause of death of the children
and this would include evidence which
tended to show that one or more of
them died as a result of unlawful
or negligent acts."

So, the qualification upon which
Mr. Sopinka relied in the Order in Council, no findings
of criminal or civil responsibility, is not to
impede the evidence. The evidence will be heard
even if it tends to show that civil or criminal acts
have been committed.

Wrapped up in that is the conclusion
that it will be received not only if it shows that
unlawful or criminal acts may have been committed,
but it will be received if it leads to suggestions
about the identity of those actors.

In other words, the qualification
in the Order in Council does not go to the admission
of evidence.

Then it goes on to say:

"While the Commissioner must not



H5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

identify an individual as being
legally responsible for a death,
he should analyze and report upon
all of the evidence with respect to
the circumstances of each death and,
if he can, make recommendations."

In other words, there is no
constraint on the evidence. There is a reporting
constraint.

The next paragraph goes on to
explain how difficult your task is. Your task is
difficult in what way? Not in deciding what evidence
is to be received or rejected but in making your
report, because the Court of Appeal says you must
make your report without expressing any conclusion
of law regarding civil or criminal responsibility,
a matter of extreme difficulty, at times approaching
the impossible; and then these words, which some of
my friends have used to constrain your power to
hear evidence:

"Where such an impasse arises, it
should be resolved, in our opinion,
by a course that best protects the
civil rights of persons the limitation



H6

1

2

was designed to protect."

3

4

That impasse arises not in hearing the Commission's evidence but in the writing of its report. Your heavy burden will be in writing the report, confronted by such an impasse, to resolve the impasse as best you can in a way that protects the civil rights of persons.

5

6

7

8

9

THE COMMISSICNER: I am sorry, can I just put this --

10

11

You say I can receive evidence that goes only to identity?

12

13

MR. SCOTT: I say you can.

14

15

16

17

18

19

I say this, that if you had ruled that you were going to -- if you had ruled in advance that you were going to hear evidence that went to identity and you had raised a question for the Court of Appeal, they would have had no jurisdiction to consider the propriety of your answer to that question; it is not a jurisdictional question.

20

21

22

23

24

25

The question that was before them had to do with the scope of your report, that is the way the question was presented, that is the way it was argued by all counsel who took the appeal, and the result



H7

1
2 speaks only to the report; and particularly this
3 phrase which you, Mr. Commissioner, have made comment
4 yourself, which appears to be designed to be a
5 qualification, is a qualification that explicitly
6 is directed at the impasse that you may confront when
7 you write your report. When you read that with the
8 statement that you -not that you may hear all
9 evidence, but that you are obliged to hear all
10 evidence. The Court of Appeal is telling you not that
11 you can do what you please, but that you must hear
12 all evidence relating to the cause of death of the
13 children even if that evidence would appear to be
14 inconsistent with one reading of the constraint in the
15 Order in Council.

14 THE COMMISSIONER: Let's take Frise's
15 evidence, whether or not you can get digoxin at the
16 drugstore. If it has any connection to cause of
17 death, it is pretty trivial, is it not?

18 MR. SCOTT: Well, it is for you to
19 say, first of all, does that have any connection with
20 the cause of death. You may conclude that it has
21 none. If you conclude that it has none, or it is so
22 tangential that it isn't worth hearing, you simply
23 say I am not going to hear it, just as I am not going
24 to hear, as you have decided, that you are not going
25



H8

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

to hear items of gossip or innuendo; they have nothing to do with the matter. You are not going to hear an up-to-date report on the Lebanon war either. Why? Because it has nothing to do with the matter, so keep it out. If, on the other hand, you think it has something to do with the cause of death, even collaterally, you not only may hear it, you must hear it. Why? Because the Court of Appeal has said so and we know the respect we owe them. Because the Court of Appeal has said so and because your first obligation to the public to give it a window on the events in this Hospital, necessitates that you should hear it. That is why all the doctors and nurses one after the other have come forward without subpoenas to tell the story, because the Hospital and the public, the community, recognize that that is one of the objectives of the exercise, to give the public, through their surrogates, the right to see what went on and, of course, to give the parents the right to see, without any restriction, what went on. The civil liberties of persons interested will be protected by your reporting function.

THE COMMISSIONER: Well, certainly we have heard any number of complaints about the civil liberties of people being affected by the



H9

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

evidence. I think letters have been coming in in the press and we have had the Civil Liberties organization and we have had everybody else complaining about that matter, and we have tried to do the best we can.

You are saying we can't pay any attention to that?

MR. SCOTT: You can pay attention to whatever you want. What I am saying to you, while we are on the subject, is that the Civil Liberties Association never took the position that the evidence before you was to be restricted. I have read their submission. They never took that position. The position they took was that your reporting obligation -- they took a position about the role of the Attorney General and the Police about which I will say nothing, that is beside this point. But on your function, the position they took was that your report, insofar as it might name names, should not be made public until the Attorney General had the right to act on it. They certainly never took the position, and as I understand it don't now, that there was anything before or anything in the Court of Appeal decision that constrained you to exclude evidence which you judge to be relevant to the cause of death.

THE COMMISSIONER: Well, they were



H10 2 very keen on keeping Phase I and Phase II apart.

3 MR. SCOTT: Yes, that's fair enough.

4 THE COMMISSIONER: Well, maybe --

5 MR. SCOTT: Everybody recognizes
6 that they were right by subsequent events. The issue,
7 as you, yourself, sir, have said, was misunderstood.
8 I mean, that isn't to say we were wrong in what we
9 did; that is to say simply that there was a mis-
10 understanding, but that is beside the point and I
11 don't want to go into that except to say that no one,
12 no one, until my friend this morning, has read this
13 decision as constraining your right to hear evidence
14 that you judge to be relevant. If you read it that
15 way, it will fundamentally alter the course of the
16 inquiry. We read it as imposing a constraint on
17 your reporting function, which you will have to
18 honour. That is the way the matter was presented,
19 the way the question was phrased and the way the
20 Court of Appeal dealt with it. The Court of Appeal
21 didn't even leave you the opportunity to reject
22 evidence which you believed, on balance, to be more
23 prejudicial than probative. They said you are
24 obliged to hear all of the evidence, even if it might
25 tend to show criminal or civil liability.



CHSC
Apr 18

ANGUS, STONEHOUSE & CO. LTD.
TORONTO, ONTARIO

513

EMT.jc
I

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Now let's come to the evidentiary matters in Phase I that you have raised in your statement the other day, and I simply there want to adopt in its entirety what Mr. Hunt had to say about them.

The critical and more difficult question is the question of the pills in the soup and the salad, and I adopt entirely what you said about that. It may bear on the question of identity, but it may very well bear on your characterization of one or more of these deaths, and that therefore it is not a question of whether you wish to hear it or not: you are obliged to hear it by Order of the Court of Appeal.

Now let me, if I can, help you to show the relevance of that evidence by giving you a couple of examples. Let's assume some six months after the epidemic period, an escalated series of deaths had occurred during the day in the Hospital, at the same level, would that evidence be relevant? Of course it would be relevant. Why would it be relevant? Because it would tilt the balance between natural causes or accident on the one hand and foul play on the other. It would be relevant.

Let us assume that some three months after the accident there had been an outbreak of the



I.2

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

same proportions on Wards 4A and 4B involving a team other than the Trayner team. Would that be relevant? Of course it would be relevant. Again it would assist you in characterizing what happened in the epidemic period because it would tilt the balance against foul play, and in favour of some other consideration such as natural causes or perhaps accident.

Now someone may say, well, this evidence, the pills in the soup and the salad, is not as directly relevant as a comparable series of deaths some six months later. That may be, but that it is relevant is clear. You may give less weight to it in characterizing the deaths than you would to the other, and it is not evidence that is without connection with the events.

The pills in the soup and the salad and the signs and all the rest of it are clearly related to events that occurred in the epidemic period. I think one of the phone calls said Nelles first and Trayner next or something like that.

THE COMMISSIONER: No, it didn't say that. It doesn't matter.

MR. SCOTT: No, it doesn't.

THE COMMISSIONER: You have got the wrong characters in this play, that's all.



I.3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. LAMEK: Someone called Scott!

MR. SCOTT: The point I make is that those events are not unconnected with the events in the epidemic period. They are clearly connected with those events and would not have occurred had those events not transpired. And as a result, what happened then has a bearing on your characterization just as a new epidemic period some six months later would bear.

Now it may point to unlawful acts, but that is beside the point. You are obliged to hear it. Now you may not be able to report as much about it as you would otherwise think appropriate, but that has nothing to do with your obligation to hear the evidence.

Now I must respectfully say that many at the Hospital are discomfitted by the Decision of the Court of Appeal because having lived through this horrible time there were many who believed that your report, after hearing all the evidence, would exonerate literally dozens and dozens of Hospital staff, doctors and nurses, who have played a part in the administration of the Hospital at this terrible time.

We look forward to that exoneration



I.4

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

and have done everything we can to put before you all the material of any type that would assist you. We have now been told that that exoneration cannot be made available because of the importance of protecting the civil rights of others.

We understand that, and are prepared to live with it, but we still think that it is in the public interest that the Inquiry, leaving aside your report, in Phase I should be as broadly based as you can make it and precisely as broadly based as the Court of Appeal has said it should be.

It will in the end be difficult perhaps for you to draw a report that will be entirely responsive to the evidence that you have heard. That difficulty the Court of Appeal has noted, and they have said that if in drawing your report the impasse arises you will resolve it in the way they have suggested. And we are confident that if there has been a full inquiry and the evidence that the Court has directed to be heard is heard, that the report will be accepted by the public subject to the constraints that the Court of Appeal has quite properly imposed.

I don't think I can assist you any further.



I.5

1

2

THE COMMISSIONER: Thank you,

3

Mr. Scott.

4

Mr. Ortved?

5

MR. ORTVED: Mr. Commissioner, on

6

behalf of the doctors for whom we act I indicate

7

firstly my support for Mr. Lamek's submissions to you,

8

and also my support with some qualification on those

9

remarks of Mr. Scott, and that the point of departure

10

with Mr. Scott is as follows:

11

We accept that there is firstly a

12

mandate imposed upon you by virtue of your Terms of

13

Reference as explained in the Reasons of the Court

14

of Appeal insofar as evidence is concerned, and that

15

that mandate insofar as evidence is different from

16

your mandate insofar as your report is concerned.

17

And insofar as the mandate regarding evidence is

18

concerned, in our respectful submission to you, you

19

are to err on the side of hearing more rather than

20

less, but insofar as the mandate concerning your

21

report is concerned, there you are specifically

22

admonished to err on the side of the civil liberties

23

of the individual.

24

That in our submission makes for a

25

difference as between Phase I and Phase II, having

regard to the context in which that decision comes.



.6

1

2

You are in the middle of Phase I, and I don't think --

3

THE COMMISSIONER: I hope we are well

4

past the middle.

5

MR. ORTVED: Well, hopefully close to

6

the end, but there has been a great deal of background

7

and I don't think that the Decision of the Court of

8

Appeal should be looked at in isolation and without

9

reference to that background.

10

I say that because it is out of

11

fairness to Mrs. Trayner that you should permit in

12

concluding Phase I the fullest possible examination

13

of all the circumstances because in my respectful

14

submission to you it would be grossly unfair to

15

Mrs. Trayner to allow all of that evidence which in

16

the argument of some may be said to tell against her,

17

to sit unanswered by her in the event she is of a

18

mind to do so, and it is having regard to that back-

19

ground of evidence that I submit to you that there

20

may be some difference between the interpretation of

the Decision of the Court of Appeal insofar as it

relates to Phase I and Phase II.

21

Having regard to that background it

22

would be my submission that we would support the

23

submissions of Mr. Hunt that really the very fullest

24

possible Inquiry should be permitted to go forward,

25



I.7

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

that the matter of protecting the civil liberties of all concerned is something with which you will have to wrestle in your report, but it will allow, as the doctors have hopefully assisted, the fullest examination as to the cause of death.

Those are my submissions.

THE COMMISSIONER: Thank you,
Mr. Ortved.

Miss Symes?

MS. SYMES: Mr. Commissioner, the Registered Nurses Association of Ontario wishes to say to you that it is important from their point of view that you continue to hear all the evidence with respect to the cause of death, and that you then are in a position to categorize each of the 37 deaths into one of Mr. Hunt's three categories, and that this function is absolutely critical not only for the public, the parents, the Hospital and its staff and the nurses, and that today you are the only person in that position to make that decision.

Now insofar as there is a possibility of wrongful conduct causing death as a possibility, you can still report such wrongful conduct occurred. The only thing you can't do is assuming that you will hear evidence to identify a perpetrator is to



I.8

1

2

write in your report that identity.

3

4

5

6

7

In other words, sir, it is our position that you ought and in fact must proceed to hear all the evidence in Phase I with respect to the cause of death, and that you should continue on with Phase II and the police investigation.

8

9

10

11

12

It was the RNAO's position both at the Divisional Court and at the Court of Appeal that you do not have the power to name names in your report, and it is our position today that the Decision of the Court of Appeal simply says that, that you cannot name names in your report.

13

14

15

THE COMMISSIONER: Well, I am not sure that it does. Maybe it does. What do you do if the problem comes up - what about let's say the dirty tricks?

16

17

18

19

20

21

22

MS. SYMES: Okay.

THE COMMISSIONER: Obviously we have to name names insofar as the dirty tricks are concerned. Does the Court of Appeal Decision say that I cannot name names in the course of showing how I reach a conclusion as to the cause of death? Does it say that?

23

24

25

MS. SYMES: I think it says that in the report, in the report you can't name names.



I.9

1

2

3

4

5

6

(2)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: No, it says - well, I can't in the report, I can't, having determined--if I determine that the children died of digoxin poisoning, I can't say who did it.

MS. SYMES: That is right.

THE COMMISSIONER: Now does it say - let's just take the example: if the dirty tricks arose and if I should reach the conclusion because of the evidence that I have received and the cross-examination, that I think the author of the dirty tricks was X, am I forbidden from doing that?

MS. SYMES: Well, sir, with respect to the question of the dirty tricks we take a different position with respect to that --

THE COMMISSIONER: Well, all right.

MS. SYMES: -- than the others, and perhaps if I could just formulate what I think is an appropriate test, sir,--

THE COMMISSIONER: Very well.

MS. SYMES:--with respect to it. My submission to you, that is on page 18 of the Decision, that you are to hear all evidence relating to the cause of death and that the Court of Appeal made no comment as to the evidence heard to date which has ranged through all of the gamuts that you have posed



I.10

1
2 to us here today. And your question to us on Monday
3 as to whether, as you cannot name names in your report,
4 whether you should hear evidence which may tend to
5 lead towards the naming of names, it is our position
6 that the Decision of the Court of Appeal does not
7 forbid it, and that it is in your discretion as
8 Commissioner as to whether or not to receive certain
9 evidence.

10 The rule of thumb that I suggest to
11 you is that if the evidence goes primarily to the
12 identity of the perpetrator, then don't receive the
13 evidence.

14 THE COMMISSIONER: Well --

15 MS. SYMES: On the other hand, if the
16 evidence is probative as to the cause of death, even
17 if it identifies a perpetrator, it should be received.
18 I thought of two scenarios as opposite ends of
19 the spectrum to assist.

20 The first is the opinion of a witness
21 without factual foundation that is based on
22 personality or character.

23 THE COMMISSIONER: That has nothing to
24 do with the cause of death and I said that from the
25 beginning, that opinion, and that is why they have
been excluded, and this is no problem.



I.11

1

2

MS. SYMES: Exactly.

3

4

THE COMMISSIONER: So it doesn't
go to the cause of death at all. It doesn't create
a problem.

5

6

7

8

9

10

MS. SYMES: Exactly, and that is how
I wish to characterize some of the problems that you
have. That to me is on the far end of the spectrum
and clearly that you should not receive that at all.
It is not probative towards the - as to the cause of
death and that it can only go to identity.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



J
BB/cr

1

2

THE COMMISSIONER: It doesn't even go to identity, I can tell you that.

3

4

MS. SYMES: Well, it may not even be relevant.

5

6

THE COMMISSIONER: Somebody's opinion without any factual basis doesn't go to anything except possibly Phase II.

7

8

9

10

MS. SYMES: But the second, such that someone was seen to have administered an unauthorized dose of digoxin to a child clearly should be received.

11

Now, with respect to the question --

12

13

14

15

16

17

18

THE COMMISSIONER: Well, there is going to be a problem in the report. We don't need to resolve it now but if someone were seen to have administered something to a child and because of that I reached the conclusion that the child died of digoxin poisoning and then do I name the name of the person who administered it in the course of reaching my conclusion.

19

MS. SYMES: No, sir.

20

21

22

THE COMMISSIONER: What will I do. Do I just simply say, well, there was some evidence that someone was seen administering digoxin, unprescribed digoxin to somebody.

23

24

25

MS. SYMES: And that that caused death?



1

2

THE COMMISSIONER: Yes.

3

4

MS. SYMES: Yes, I say you do not name
the person.

5

6

THE COMMISSIONER: You do not name the
person.

7

8

9

10

11

12

MS. SYMES: No.
THE COMMISSIONER: The fact that of
course it has been blazed around in the headlines
doesn't make any difference, is that it. The
five year old child that we have been talking about
will say, I'm slightly less developed mentally than
he is.

13

14

MS. SYMES: Sir, perhaps if it were
that obvious perhaps the police would have laid
charges.

15

17

THE COMMISSIONER: Well, maybe some
people will agree with you that it is that obvious.
Anyway, all right, I hear what you have to say.

18

19

20

21

MS. SYMES: With respect to the issue
of the pills in the soup, it is our position that it
is a leap in both logic and faith to connect whoever
put the pills in the soup did the other dirty tricks.

22

23

24

25

THE COMMISSIONER: That's what you say
and I may well agree with you but there are other
people here who seem to think that perhaps that has



1
2 some nexus with the question of how. . As Mr. Scott
3 put it, this is an extraordinary event that took
4 place within months - perhaps it was Mr. Hunt, I
5 shouldn't give credit where it isn't due - and
6 it therefore is something that I can take into
7 consideration. I don't know whether I will or not
8 but if we don't hear the evidence then we can't even
9 hear the argument, can we?

10 MS. SYMES: Well, Mr. Commissioner,
11 we have already heard from the Preliminary Inquiry
12 that these events in fact took place and that is
13 properly before you as part of the terms of reference.

14 THE COMMISSIONER: Well, I know, but
15 if it is before us then surely Mrs. Trayner can be
16 asked about it. If it's before me, if it is some-
17 thing I can consider then surely she has to be asked
18 about it as well.

19 MS. SYMES: Sir, no, I wish to
20 represent the other side of it and that is that it
21 is not relevant, it is not relevant to the cause of
22 death, that there is no link because that happened,
23 dirty tricks happened many months after the death of
24 the children and a cause and effect link.

25 THE COMMISSIONER: It isn't conclusive
of it. All they say is that it is something that I



1
2 should consider in determining the cause of death.

3 The fact that somebody was in the same ward with
4 the same team was going through this business of a
5 heart drug being found in somebody's salad or some-
6 body's soup and this is the same team that was
7 suffering from the deaths of children conceivably
8 from digoxin poisoning they say there is a
9 connection there. They say that it will assist me.
10 I don't know whether it will, surely I don't have to
11 decide that fact now but if it is arguable that it
12 will and if in fact the Court of Appeal has said
13 nothing about evidence at all would it not be fair
14 that I should hear it?

15 MS. SYMES: Well, my submission to you
16 is, no, that it shouldn't.

17 THE COMMISSIONER: Because it has no
18 relevance?

19 MS. SYMES: Because it has no relevance
20 and that I submit that the link which I heard Mr.
21 Hunt and Mr. Scott make was tenuous at best.

22 THE COMMISSIONER: But if it is
23 tenuous still can't I hear it, that's the point.

24 MS. SYMES: The only thing out of it
25 that made any sense in my submission was that it
occurred and that that is already before you and that



5
1
2 it need not go any further as to try to identify
3 the who. One other possible scenario, sir, that
4 might be considered, is that the series of events
5 leading up to the deaths and the arrest of Susan
6 Nelles may have caused imbalance as opposed to the
7 same imbalanced person who put pills in the soup
8 necessarily caused the death and that surely is an
9 equal scenario; in other words, the identity of the
10 perpetrator of the dirty tricks is not relevant as
11 to the cause of death. The fact that they happened
12 is already in evidence before you from the Preliminary.

1
13 With respect to certain of the other
14 things, for example, the meeting on March 23rd, it
15 is our position that clearly any discussions as to
16 the cause of death of a particular baby are relevant
17 to the cause of death; for example, the explanation
18 of Pacsai and the innocent explanation confirmed
19 by Halpenny are properly before you.

18 With respect to euthanasia, we take
19 no position on that.

20 With respect to the availability of
21 the drug digoxin over the counter, we think that that
22 is relevant as it goes to the availability of the
23 drug digoxin both within and without the Hospital.

24 THE COMMISSIONER: That surely has only
25



1
2 to do with identity. It means that anybody could have
3 gotten it, that's all.

4 MS. SYMES: Surely that as an
5 explanation might broaden it beyond the people who
6 have been so far overlooked.

7 THE COMMISSIONER: Well, that's right,
8 but it will explain that it could have been anybody
9 but how does that affect the cause of death, I
10 don't understand it.

11 MS. SYMES: Well, it certainly runs
12 counter to everything that the Atlanta Report did.

13 THE COMMISSIONER: But I just don't
14 understand that argument. The reason of course that
15 you think that evidence, because it points away from
16 the nurses presumably, that's the purpose of it.

17 MS. SYMES: Yes.

18 THE COMMISSIONER: But I'm not supposed
19 to point at the nurses so why should I point away from
20 them. I don't understand it.

21 MS. SYMES: Because there may be other
22 explanations.

23 THE COMMISSIONER: Exactly. It could
24 have been somebody else, it could have been the garbage
25 man or it could have been the best customer of the
drug store or somebody like that who could have done



1
2 that. But I'm not allowed to do that, I'm not allowed
3 to say who is responsible for it because the civil
4 rights of garbage men and of casual shoppers in
5 Boots Drug Market are every bit as important as those
6 of the nurses.

7 MS. SYMES: Well, sir, I don't think it
8 is simply that way. I mean, the evidence with respect
9 to --

10 THE COMMISSIONER: You don't think they
11 are as important?

12 MS. SYMES: As to who --

13 THE COMMISSIONER: I am not making
14 fun of it but the whole business of Miss Frise and
15 her expedition to the drug store, while it was
16 interesting and I must say it caused a colossal
17 furor in the reporting leagues because I am told
18 that there were more shoppers for digoxin in drug
19 stores that night than there were in a long history
20 of pharmaceutical commerce. But I still don't see
21 how it really helps to do anything except say anybody
22 could have done it.

23 MS. SYMES: Well, sir, for that end,
24 as this Inquiry has been tending to narrow down into
25 a very select number of people who could possibly
have done any one of the three methods or causes of



1
2 death I think it should be heard.

3 THE COMMISSIONER: All right, all
4 right.

5 MS. SYMES: Finally, with respect to
6 the matter of Phase II, I mean, it is our position
7 that --

8 THE COMMISSIONER: Well, I think I am
9 accepting Mr. Scott's injunction. I don't really
10 think that Phase II, that we can resolve that today.
11 I think Mr. Lamek has asked that that go over until
12 the end of Mrs. Trayner. If it is short I am happy
13 to hear what you have to say.

14 MS. SYMES: Well, it is just that it is
15 our position that Phase II is not moot and that
16 important issues can in fact be heard with respect
17 to that and we wish to make further submissions
18 with respect to that.

19 THE COMMISSIONER: Yes, you will have
20 that opportunity. All right, thank you.

21 Mr. Knazan?

22 MR. KNAZAN: Mr. Commissioner, subject
23 to a specific request by you we can't really offer
24 any assistance to your dilemma. The reason for that
25 is not that we have no views on the matter, but rather,
the particular affect that we think the Court of



1
2 Appeal Decision has on our client and, that is, that
3 our interest or our standing has possibly been called
4 into question.

5 You will recall, as I have reminded you,
6 that we never asked, Mrs. Christie never asked to be
7 represented individually or be funded.

8 THE COMMISSIONER: I am sorry, I thought
9 she did.

10 MR. KNAZAN: No, I appeared on the
11 first day back in May of 1983 on behalf of all of the
12 Registered Nursing Assistants and then there was a
13 suggestion from you to both me and Miss Symes who
14 was appearing on behalf of all the nurses and the
15 basis of our presence is your famous statement, which
16 has also been quoted again in the Court of Appeal
17 Decision:

18 "I cannot imagine that there could ever
19 have been the slightest doubt as to why
20 each of the members --"

21 THE COMMISSIONER: Well, I must say
22 your client is no longer at risk and neither are any
23 of the nurses who have been represented throughout
24 because obviously I can't name them as perpetrators.

25 MR. KNAZAN: So, Mr. Olah for a long time,
and I more recently, have been suggesting or inviting



10 1
2 you to make an early statement that certain people
3 were not in any danger under Section 5(2).

4 THE COMMISSIONER: Well, they apply
5 to Mrs. Trayner and Susan Nelles as well.

6 MR. KNAZAN: I agree. So, a result of
7 this may be that all five be set free, but I am just
8 explaining --

9 THE COMMISSIONER: Set free. I didn't
10 know that we could jail them.

11 MR. KNAZAN: Well, no, cut loose.

12 THE COMMISSIONER: To remove the chains.

13 MR. KNAZAN: It can now be said that
14 we are here voluntarily in view of that statement
15 that you could not imagine any doubt as to why we were
16 here. But you are right, the logic of it, I don't
17 think you can say that two or three can go and leave
18 the others because that would in effect be pointing
19 a finger, you would have to say it to all five.

20 THE COMMISSIONER: Yes.

21 MR. KNAZAN: That's the basis of our
22 having no particular submissions on the evidence,
23 subject to your request.

24 THE COMMISSIONER: Yes, all right, thank
25 you.

MR. KNAZAN: Thank you.



1

2

THE COMMISSIONER: Mr. Rosenberg?

3

4

5

MR. ROSENBERG: Mr. Commissioner, I
just want to speak to one aspect of it that possibly
affects my client and that is the question of the
dirty tricks.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I think I support what Mr. Hunt and
Mr. Scott have said as to the relevancy and I don't
think there is anything that I could possibly add
that would go to that issue or would add more
relevancy to it or anything like that. But what I
do say, in terms of weighing the decision as to
whether to let it in and adopting Mr. Scott's view
as to where the balance should be struck, one of the
things to consider is that up to now we essentially
have only heard Mrs. Scott's version of the events
and only essentially those events that relate to her.
It strikes me that that gives an improper distortion
or focus as to what was really going on in the months
at the Hospital and that if you are in any doubt as
to the relevancy and where to strike the balance that
perhaps the fact that you tip the balance in hearing
that evidence is that the public and the entire
picture be before you and before the public and there
is no improper distortion as to where those events
were focussed and as to exactly what was going on.



1
2 In my submission, that is something to
3 consider when you are considering the rights of
4 various people who are involved.

5 Thank you

6 THE COMMISSIONER: Thank you. Mr.
7 Olah?

8 MR. OLAH: I think, Mr. Commissioner,
9 that Mr. Scott has very eloquently put my position.
10 I don't wish to repeat his submissions which in turn
11 have adopted the majority of Mr. Hunt's submissions
12 but I would remind you, sir, the function and purpose
13 of a Royal Commission, with which you are more
14 familiar with than anyone else, and that is the bearing
15 of the community's resources on a particular problem
16 and that the community will know that there will be
17 a total and comprehensive examination of all of the
18 facts that surround a particular matter.

19 In this case, the Court of Appeal has
20 said to you, because of the unique character of this
21 proceeding, that there is another value that must be
22 protected and the protection they have imposed has come
23 at the tail end of the proceeding, that is, when
24 your report is presented.

25 So that in my respectful submission,
as Mr. Scott has pointed out, should not confuse your



13 1 fact finding function with your reporting function.
2 Right now, all we are involved in is a question of
3 what your role or what the ambit of your fact finding
4 function is and the Court of Appeal, as Mr. Scott and
5 Mr. Hunt has pointed out, said that if there is any
6 relevant evidence with respect to cause of death then
7 it is your duty, your positive obligation to receive
8 it and, in my respectful submission, the Court of
9 Appeal has made that abundantly clear and I would
10 invite you and ask you to carry out that function that
they have imposed upon you.

1 That leads into the issue of dirty
tricks. In my respectful submission, the test that
13 you must apply is that if you find it relevant at
all to the issue of cause of death, in my respectful
submission it should be received and in my respectful
15 submission there are ample reasons for its reception.
17 There are striking similarities, as Mr. Hunt pointed
18 out, between the finding or the use of medication in
19 an unlawful manner or possible unlawful manner when
20 you are examining the possible unlawful administration
21 of medication of another sort some time previously
in a hospital.

22 And then of course the character of the
23 phone calls which deal with threats of death,
24 accusations of murder or suggestions of murder.
25



18apr84 2
K
DMrc

1
2 And thirdly, because you may view it
3 as a pattern or an attempt to divert suspicion of
4 some kind, and it may be relevant in determining
5 whether or not there was accidental death there or
6 non-accidental death. So that it may be of some
7 relevance or use to you and, if you find that it is,
8 then in my respectful submission it should be
received.

9 I concur, it is my submission that
10 the evidence of Miss Frise does not assist you and --

11 THE COMMISSIONER: I'm sorry, which
12 does not?

13 MR. OLAH: The evidence of Meredith
14 Frise does not assist you, and if you come to that
15 conclusion, then of course it is not relevant and it
is totally within your discretion.

16 Now, I would like to make, in due
17 course, submissions on your reporting function, which
18 is something different and, in my respectful sub-
19 mission, should be heard at some other time. It may
20 be that your reporting function should be discussed
at some stage when the evidence is concluded.

21 In closing, I would say to you, sir,
22 that if you have any serious doubt about what mandate
23 you have had imposed on you or left with by the Court
24
25



K2

1

2

3

4

of Appeal, then maybe Mr. Percival's suggestion is the right one; that if there is any serious doubt, maybe it should be canvassed somewhere else.

5

THE COMMISSIONER: Where were you going to suggest?

6

7

MR. OLAH: Well, the Supreme Court of Canada.

8

THE COMMISSIONER: Oh, oh.

9

10

11

12

MR. OLAH: But in my submission, the rules that the Court of Appeal has suggested to you are fairly clear, as Mr. Scott has indicated, and hopefully they should be resolvable certainly when it comes to the fact-finding process.

13

14

15

16

17

THE COMMISSIONER: I tell you one thing I am going to do, I am going to recommend all the authorities and all the people who found these rules so clear will be the next candidates for heading commissions!

18

19

MR. OLAH: Mr. Scott is the one for that candidacy!

20

I don't believe I can assist you any further, sir.

21

22

THE COMMISSIONER: All right. Thank you.

23

MR. Shinehoft.

24

25



K3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. SHINEHOFT: Mr. Commissioner, the only comment that I would like to make is in regard to what Mr. Olah lastly said, and that is in regard to your reporting function.

My submission is very simple, and it is this. If the Court of Appeal, and their decision is one that you can live with; that is, that you can feel that it allows you to write a meaningful and comprehensive report within the parameters of your mandate, then my suggestion is, let's get on with these proceedings. However, if you feel that you cannot, then it is my submission, Mr. Commissioner, that you owe it to yourself, to the parents and to the public, to apply for leave to the Supreme Court of Canada.

Those are my submissions, Mr. Commissioner.

THE COMMISSIONER: Have you considered the practical problems involved in that?

MR. SHINEHOFT: Well, I have.

THE COMMISSIONER: What do we do? Do we sit and wait until --

MR. SHINEHOFT: No. We go on and we try to expedite it and try to get it on as quickly as we can.



1

K4

2

THE COMMISSIONER: No. What do we
do about the hearing and the report in the meantime?

3

4

MR. SHINEHOFT: Well, I agree with
Mr. Scott in terms of the admissibility of evidence
and the tendering of evidence; that the Court of
Appeal has not said anything in that regard; that
you are perfectly entitled to hear and receive all
this evidence.

5

6

7

8

9

10

THE COMMISSIONER: Surely, even
with this Commission there will come a time when the
evidence is at an end. Then, what do we do?

11

12

MR. SHINEHOFT: You do have Phase II
to go through, Mr. Commissioner.

13

14

THE COMMISSIONER: So you say.

15

16

17

18

19

20

21

22

23

24

25

MR. SHINEHOFT: My suggestion is
very simple - that you contemplate the strictures
that have been placed upon you, on yourself, in
accordance with the decision rendered by the Court of
Appeal. We are here to try and help you in that
regard. But if, after you have sorted through all
the submissions that counsel have made to you, you
feel you can't fairly make a report, then surely
leave should be applied for to the Supreme Court of
Canada to clarify the issue once and for all.
Otherwise, as one person has said, it is a \$7 million



K5

waste of money.

THE COMMISSIONER: That, incidentally, now that you have brought that up - \$7 million is about seven times too much.

MR. SHINEHOFT: Oh, all right.
\$700,000?

THE COMMISSIONER: I had better get the precise figures from the administrator, but he is constantly telling me how we are under budget. I should not be letting that note out to funded counsel.

MR. SHINEHOFT: Does that mean, Mr. Commissioner, I can't render my account for this month?

THE COMMISSIONER: Well --

MR. SHINEHOFT: Those are really my submissions, and it only goes to the question of the reporting function.

Just, if I could, and it may be a silly thing to add, but it might be important to differentiate in the Court of Appeal decision what is considered ratio decidendi and what is considered obiter dictum, and they were asked to give a specific answer to a specific question and they volunteered some information as to what your functions are, and maybe it doesn't go to the pith and substance



1
K6 2 of the decision at all.

3 Those are my submissions.

4 THE COMMISSIONER: All right. Thank
5 you, Mr. Shinehoft.

6 Mr. Tobias.

7 I don't know, I suppose we have to
8 hear from Mr. Labow and I suppose, Mr. Thomson, you
9 want a chance to come back, and Mr. Lamek. Should we
rise now or should we --

10 MR. TOBIAS: I am in your hands, Mr.
11 Commissioner.

12 THE COMMISSIONER: I get a nod from
13 counsel.

14 Are you available this afternoon,
15 Mr. Tobias?

16 MR. TOBIAS: Yes.

17 THE COMMISSIONER: Mr. Labow?

18 MR. LABOW: Yes, I am, Mr. Commissioner.

19 THE COMMISSIONER: Well, we will rise
20 now until 2:15 this afternoon.

21 --- luncheon recess.
22
23
24
25



-- (Upon resuming at 2:15 p.m.)

THE COMMISSIONER: Yes, Mr. Tobias.

MR. TOBIAS: Mr. Commissioner. I did come in late this morning and I apologize for that, but I have had an opportunity to review at length the submissions made by Mr. Percival, and to discuss with Mr. Marshall the submissions which had been made by Mr. Hunt. Succinctly put we adopt most of what Mr. Scott submitted to you this morning, and we certainly adopt the sum and substance of Mr. Percival's submissions, as well as those of Mr. Hunt.

The point has been made several times this morning, and I don't think it bears detailed recital by me, that as I read the Court of Appeal decision it would appear from the comments contained on page 18 and 19 clearly, that the thrust of the decision goes to what you are entitled to report on, and not the evidence that you are entitled to receive.

I would submit to you that that is not a coincidence. It was submitted to the Justices in the Court of Appeal that what you were obliged to do given the Terms of Reference and given the statements made by the Attorney General, was to



2

1
2
3
4
5
6
7
8
9

conduct as full and complete an enquiry into all relevant circumstances and facts as you possibly could. I, in particular, pointed out about half a dozen passages in the statement of the Attorney General, and two or three specific passages in the Terms of Reference themselves, which made use of the word "full examination, full public knowledge". etc.

10
11
12
13
14
15
16
17
18
19

I think that in reaching their decision it is obvious to me that the Justices of the Court of Appeal directed their minds to that issue, to the need for the public and the parents to be fully informed of all relevant facts. It is something that can be looked at quite distinctly from the enjoining prohibition in the Terms of Reference, that you are not to express a conclusion of law with respect to civil and criminal responsibility. That prohibition goes clearly to what you are entitled to say and conclusions you are entitled to reach in your report.

20
21
22
23
24
25

It was not submitted by any of the Appellants in the Court of Appeal, nor I submit to you now, is it to be taken from the Court of Appeal Judgment that you are to be enjoined or prohibited from having a full and complete hearing of all the



3
1
2 facts.

3 Now, having said that, I must
4 part with Mr. Scott on one particular point,
5 because I think he may have put it too strongly. I
6 heard him this morning, if I understood his comments
7 correctly, to be telling you that in fact the Court
8 of Appeal went further, and the Court of Appeal told
9 you that you must, and I underline the word must,
10 hear all of the evidence and he urged upon you the
submission -

11 THE COMMISSIONER: I can't, I don't
12 think he went quite that far. I can't decide that
13 the events in Lebanon are not relevant to the issue
before me.

14 MR. TOBIAS: I think what he meant
15 was all of the relevant evidence. I merely seek to
16 make this distinction, sir. I really don't perceive
17 the Court of Appeal Judgment to leave you in that
18 much different position then you have been in for
19 ten months, in this sense. I think for ten months
20 what you have been engaged in, sir, with respect is a
21 very, very delicate balancing act. I think with
22 respect to every line of questioning and with respect
23 to every area of evidence, what you have been trying
24 to do, as I perceive it, and I think quite properly,
25



4

1
2 is to weigh the prohibitive value of that evidence
3 with respect to both issues, because as I perceive
4 it your original ruling - there were two issues,
5 you were looking at how and by what means. You were
6 seeking to draw from that what you felt to be the
7 value and weighing against that the possible
8 prejudice that that evidence might do. You seemed
9 to me in your rulings, and I think they have been
10 consistent, sir, to be saying that if a particular
11 area or line of questioning is of so little
12 prohibitive value that the prejudice outweighs it,
13 then you have not allowed that question in.

14
15 Now as I see it, what the Court of
16 Appeal does is merely narrows that exercise in the
17 sense that is exactly what you have to do now with
18 respect only to half, and, "by what means" meaning
19 the physical means, not the identity.

20
21 I would submit to you, sir, that
22 in effect Mr. Hunt's submissions are not in
23 conflict with that balancing exercise, for this
24 reason. This is not an enquiry looking at the
25 circumstances of one death. Now, if it were, he
26 would be in a much more difficult position.
27 Because I think there are many areas of evidence
28 the "dirty tricks" for instance, and I could use



5
1
2 others but I will confine myself for the purposes
3 of this example just to that. It seems to me that
4 were you looking at one death, that evidence is of
5 so little prohibitive value with respect to that
6 one death and that one death only, that indeed the
7 prejudice that may be done to innocent parties far
8 outweighs it.

9 However, what we are dealing with
10 in effect is an investigation into 36 deaths,
11 and by the nature of the events themselves, there
12 would not be one or two central pieces of evidence
13 which allow you to reach a conclusion. Any
14 conclusion which you reach regarding how those
15 babies died, and under what circumstances, will be
16 reached by putting together a series of events by
17 way of a set of building blocks, as it were, so that
18 when you review the whole fabric of all of the
19 evidence and apply it to 36 separate sets of
20 circumstances, you may indeed find the individual
21 pieces of that set of building blocks prohibitive,
22 and that is the way I submit that you are required
23 to proceed now.

24 Therefore, I don't perceive you
25 to be in an essentially different position as a
result of this decision then you were two months ago



6 1
2 with respect to what pieces of evidence you will or
3 will not admit.

4 Now, speaking in particular to the
5 various options canvassed by Mr. Percival, I say
6 humbly, sir, that you have not sought, as I read
7 your comments of Monday, you have not sought my
8 counsel nor anyone else's counsel for that matter
9 on the question of appeal. I don't intend, sir,
10 to embarrass these proceedings by offering my
11 counsel at this time and in this particular forum.
12 I will say this, however, it seems to me a perfectly
13 fair comment, that quite apart from the merits of an
14 appeal, and quite apart from your own personal
15 feelings about the appeal, or the feelings of any of
16 the other parties, that as a practical matter the
17 proceedings must continue, there is no question about
18 that, no sensible person would argue otherwise.
19 The sole question whether you appeal or whether you
20 do not appeal, sir, and that is a decision for you
21 to make having taken your own counsel in private,
22 that question becomes one of the conduct of the
23 proceedings and what evidence may be received while
24 the appeal route is explored, if indeed that is the
25 route that you go.



EMT. jc
BB

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

And I would reiterate that again I perceive no significant change in what you are entitled to do with respect to the receiving of evidence for two particular reasons: because of the specific comments made by Mr. Sopinka in the Court of Appeal and the position he took, as well as because of the specific and clear language in the last eight lines on page 18 of the Court of Appeal Judgment you are:

" ... obliged to hear all of the evidence relating to the cause of the death of the children and this would include evidence which tended to show that one or more of them died as a result of unlawful or negligent acts."

I think that that direction is clear.

I think it is unequivocal, and taking into account the very point that Mr. Hunt made this morning and the point that I seek to emphasize about the entire process being one of a series of building blocks, I think it is clear that you have got to receive that evidence, although it may have a tinge of both identity and how did the babies die.

Now the second point is, as I have said before, since a lot of the questions, the



BB.2

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

controversial questions, will have both elements in them, you will be involved in a balancing act. However, I submit that is no different than what you have been doing since the inception of these hearings.

You said in your ruling, as I read it, sir, that you felt you were entitled to, subject to the qualifications set out in your Judgment, to identify an individual if the evidence justified ... I didn't read your Judgment or anything that you have said over the past 10 months as saying that you would name individuals, and ergo every time you hear evidence in a controversial point, and every time you have heard that evidence, you have been involved in this balancing act, and I submit to you, sir, relevant to the question of an appeal, that if you or any of the other parties appeal, that identical procedure will continue while the appeal is pending.

I don't think that the question of the appeal itself one way or the other goes to what evidence you are entitled to hear. I also, with respect, do not feel that it goes to what evidence counsel is entitled to refer to in argument. The Decision clearly only goes, sir, in my respectful submission to what you can say in your report.

Now having said that I would like to



BB.3

1

2

(2)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

conclude with one last point. I perceive, and it may be wrongly, sir, and if it is I certainly mean no disrespect to you or your office whatsoever, but I perceive that there is a current of unrestlessness within these proceedings due to the view that some of us hold that the timing of the report itself is a critical issue.

Now in a blanket fashion I don't disagree with that. This is obviously --

THE COMMISSIONER: That is pretty subtle. I missed that. What is the timing?

MR. TOBIAS: I am sorry, sir?

THE COMMISSIONER: Are you being deliberately subtle or am I just being dense?

MR. TOBIAS: No, sir. I may perhaps have been too subtle.

What I am saying is this: I perceive that there is a great concern that your report is a report which must be brought forward and put before the public in as timely a fashion as possible. Quite apart from how long the hearings go on, the report itself must be brought forth, and when I say that I don't --

THE COMMISSIONER: Well, wait a minute. It is best not to give the report until after the hearing is over.



BB.4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. TOBIAS: Yes. I agree with that, sir. I think that is a stalwart observation. If I were your counsel I would be giving the same advice, that you should conclude the hearings first.

When I say that I don't disagree with that in a blanket fashion it is in the sense: these are obviously matters of immense public concern, and they go far beyond the parties before you. They go to the entire population because everyone in this province - I will go further - everyone in this country, people in other countries, have a stake in that hospital. It is a world renowned institution.

However, I would urge this upon you, sir: if we have to make a choice between the need to bring your report forth quickly so that the public can have the benefit of your observations in an expeditious manner, if we have to choose between that and the completeness of the report, and the completeness goes to two things, not only the quality of the report itself but how the public will perceive that report - if we have to choose between the two of them, and we may be in that situation, I don't know, I only throw it out for thought - if we have to choose I would urge you to err in favour of the more complete report even at the cost of a timely report because it



BB.5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

seems to me that the most critical factor is the quality of that report, its completeness, the completeness with which you have fulfilled your mandate, and how the public - forget for the moment the parents because they are only one facet of the public - how the public perceives that report.

That I would urge upon you, sir, more sincerely than any other principle that I have urged upon you since these proceedings began.

Thank you, sir.

THE COMMISSIONER: Thank you.

Mr. Labow?

MR. LABOW: First of all, Mr. Commissioner, on a matter of practice, I have attempted to discern from the Supreme Court of Canada whether someone solely with intervener status can launch a leave application to that Court, and there is no law in the area.

The only law in the area indicates that if the parties to an appeal do launch a leave application, all the interveners are automatically parties to the leave application unless they choose to drop out.

THE COMMISSIONER: Mr. Scott says he has several examples.



BB.6

1

2

3

4

MR. LABOW: I was just going to point out that I would like to see Mr. Scott's examples because --

5

6

7

THE COMMISSIONER: He has offered them. I don't know whether I can force him to reveal them now but --

8

9

10

MR. LABOW: Well I intend to ask him for them.

11

12

13

14

15

16

17

18

19

20

THE COMMISSIONER: -- but it is an undertaking it seems to me.

MR. LABOW: The most recent decision of the Court in that type of situation involved a matter where a party who was directly involved in the trial and was directly affected by an appeal decision was not granted leave to appeal solely as an intervener, and then at a later date the Supreme Court of Canada did grant leave to appeal but did not allow that party to intervene because they had already been turned down, and that's a decision of V.K. Mason Construction and the Bank of Nova Scotia, and it is a very recent leave application.

21

22

23

24

25

THE COMMISSIONER: But surely the Supreme Court of Canada is not bound by rules like that. Surely they can if they want to grant leave to anybody to do anything.



BB.7

1

2

3

4

5

6

7

MR. LABOW: I think that that is absolutely correct, Mr. Commissioner, but I also think that if the parties directly affected in a matter, especially when the party most directly affected is a Justice of the Court of Appeal of Ontario, chooses not to ask leave --

8

9

10

11

THE COMMISSIONER: No, no, it is not my rights that are being affected. It is just my sensitivity. It has got nothing to do - the fact that I can or cannot does not affect me. It does affect your clients.

12

13

MR. LABOW: I think it does too, Mr. Commissioner.

14

15

16

17

THE COMMISSIONER: It does affect your clients considerably more than it affects me. And that doesn't mean that I am not concerned that justice should be done and justice should appear to be done, but I have no rights at issue in this matter at all.

18

19

20

21

My main concern is the fact that I have to get a report out. Now Mr. Tobias would like me to get out a good report rather than get out a speedy report, but I think that is a balancing act. You have to consider whether it is worth it to delay.

22

23

MR. LABOW: Well, Mr. Commissioner --

24

25

THE COMMISSIONER: However, I am not



BB.8

1

2

going to decide on the question of appeal today, I
can assure you of that.

4

MR. LABOW: I must tell you, Mr.

5

Commissioner, that we understand the problems of the
timing of this matter, and I am not asking you to
appeal. I am saying that most of my clients would
rather appeal this Decision because they liked your
previous Decision a lot better than they liked the
Decision of the Court of Appeal because they feel
that they are entitled to know everything that they
can possibly know in this matter as they are the
most directly affected.

12

13

14

15

16

17

Notwithstanding that I do understand
the practical considerations here. And I must tell
you that we do not feel the situation lies from us
at this time to ask to appeal this matter if you do
not feel it is in the best interests of this
Commission.

18

19

20

21

Now I adopt as well Mr. Scott's
interpretation of the Judgment of the Court of Appeal
in that all they have tended to do is restrict the
scope of your report.

22

23

24

25

I also adopt Mr. Hunt's submission,
and I adopt that submission essentially for Mr. Tobias'



BB.9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

reasons. You may be faced with a number of somewhat
tenuous pieces of evidence, but because we are
involved in a situation where you won't have clear-cut
answers, at the very least the evidence must be
presented to you so in your final analysis you can
review all the evidence and then decide what you feel
is and is not relevant.

Surely any matters that we have dealt
with to date and that people have been examined and
cross-examined upon (and I don't restrict that in any
way) is a subject that we should be able to deal with
in the future because objections were led at the time
no doubt dealing with the irrelevance of a number of
areas, and you ruled that you may not understand
the relevance completely but you wanted to hear the
evidence in any case. And our submission is you
should still proceed on that basis.

Unless it can be demonstrated to you
that the evidence is totally irrelevant as to how and by
what means any of these children died, that evidence
should be before you, and when you write your report
you can then take into account all the evidence that
you feel does or does not belong in your report to be
presented to the public.

In addition, Mr. Commissioner, my



BB.10

1

2

3

4

5

6

7

8

9

10

clients feel that at the very least the parents are entitled to hear any or all evidence that may be relevant in any way to the cause of death of their children, and Mr. Scott has said to you that the public should be allowed to draw their own conclusions even if you can't. I don't know if I agree or disagree with that position, but I do put forward to you that the parents must be allowed to hear any and all evidence so that they can draw whatever conclusions they can come to.

11

12

13

Now you may not be able to report on certain things, but I submit to you that the parents have a right to hear anything that might be relevant.

14

15

16

17

18

19

20

21

I don't think that the Court of Appeal Decision restricts you in any way, that you can hear all of these things, and if you feel in reviewing all of the evidence that certain pieces of evidence were totally irrelevant, then I submit to you you shouldn't report upon it. You shouldn't include it in your report in any way, and that is something that they told you you should do, and you should leave out anything that goes only to identity.

22

23

24

25

I submit to you that we haven't heard any evidence that goes only to identity because, as Mr. Hunt put before you, anything that indicates that



BB.11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the deaths were not natural or accidental in some way goes to the converse and may help you decide that the deaths were deliberate in some way. And I think that that is a key thing for you to decide here.

You have to decide, and I submit to you that the reason you have to decide these things is to tell the parents whether their children died naturally or unnaturally. I submit to you that in order for you to do that you should not restrict yourself at this point in time to hearing and not hearing certain pieces of evidence.

Those are my submissions.

THE COMMISSIONER: Thank you.

Mr. Thomson?

MR. THOMSON: Thank you, sir.

As you can tell I am alone in my submission, and may I please attempt to review it briefly so that I can attempt to put in focus the position that I make which obviously is quite opposed to the submissions so forcefully put by my friend Mr. Scott and Mr. Hunt.

There is a civil liberties concern in two aspects of the hearing: one has already been addressed by the Court of Appeal. That is the question as to whether or not you, sir, are entitled



BB.12

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

to identify any suspected wrongdoing. That subject
to any further appeal is resolved. But there is a
second civil liberties question which I was attempting
to address this morning and which I think now
following all the submissions, can be brought into
focus. And that is the question of what if any
rights of my client are being abused as a result of
the process of questioning that is occurring and is
about to occur.



18apr84
CC
BMcrc

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

So, I am saying there are two distinct questions. One was addressed by the Court of Appeal and I concede the second one was not, although, as I come to develop my argument, I will be arguing that the finding of the Court of Appeal has a bearing on the kind of questions that ought properly to be put to Mrs. Trayner. I am arguing, sir, respectfully, that it is wrong and illegal for her to be subjected to questions which are, in the circumstances here, not necessary and proper.

Now, the first question, I believe I join with your counsel, Mr. Lamek, on this and I part company with Mr. Scott and the last counsel who argued, it was suggested to you that a public inquiry can serve two purposes. I understand the logic of this because sometimes they do. The one purpose is to allow the public to hear all the evidence and make of it what they will. We have had inquiries dealing with environmental concerns and indeed explosions which, obviously, an important part of the inquiry was that public concern and, then, there is the second part of an inquiry, which is normally the one that people are concerned with, and that is the finding of the Commissioner, who will find facts and make recommendations.



CC2

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

But I respectfully submit that in this inquiry and, indeed, in most inquiries that affect the rights of people who are participating there, and, as I say, I believe I join with Mr. Lamak in saying this, you ought not to be considering evidence that is not relevant and useful for you, and I feel that that is a very important position, a very important question for you to resolve because, as you have heard, counsel here are plainly divided on that. Mr. Scott says, let the people decide. We are not going to talk about Lebanon, we are going to talk about anything to do with the mysterious deaths at the Hospital. Let the public decide whether it is useful to Mr. Justice Grange -- I'm sorry, to Commissioner Grange, whether he can decide now that it is relevant, don't worry about that, put it all in because it will be useful for the public to open a window and decide and, of course, what it will accomplish in the practical reality here is that my client, as I observed in opening, statistically and in terms of what has been said, has been pointed to as a prime suspect, and I will say it again.

Now then, what we then have is that, in effect, my client is being put on trial in the press and in the broadcast media and, Mr. Commissioner,



1
CC3 2 I say very respectfully I am not trying to say some-
3 thing that is outrageous this afternoon, I ask you
4 to consider that point very seriously and very
5 carefully, that the process here is one that inter-
6 feres directly with the civil rights of Mrs. Trayner.

7 Now, I also want to make this --

8 THE COMMISSIONER: Let me just
9 accept that it does, that's the nature of the beast,
10 that's the nature of the inquiry. It was put to the
11 Divisonal Court and then, by appeal, to the Court of
12 Appeal as to whether, in the circumstances, a report
13 which identified her or anyone else, whether it
14 could be tolerated in light of the effect upon her
15 civil rights, and the Court of Appeal decided, no,
16 it could not. That's as far as it has gone and no
17 one has said, this is what everyone is telling me
18 at any rate today, no one has said that her civil
19 rights -- Before I say this, let me tell you I am
20 concerned with everybody's civil rights and I have
21 always been concerned with whether we should just
22 casually, by innuendo or any other way, damn anyone
23 when it is unnecessary. But I have to bear in mind
24 that I am supposed to find out the best I can how
25 these children died.

Now, if in the course of finding



1
CC4 2 out how these children died, some evidence that might
3 implicate your client or anyone else has to go in,
4 I have to receive that in order to find out how the
5 children died and then, having decided, if I do
6 decide that they did die at the hands of someone by
7 digoxin poisoning, by accident or design, I just make
that finding without saying who it was.

8 Now, it is going to be the most
9 delicate problem in the world because I start off
10 by dealing with the evidence that implicates someone
11 in order to find out whether the death was
12 natural or unnatural, then having decided, if I do,
13 that it was unnatural, I then can't go back and
14 identify the person who was responsible for it - it
15 is sort of an Alice-in-Wonderland logic, I must say -
16 whose complicity has led me to believe that there was
an unnatural death.

17 MR. THOMSON: Will your Lordship
18 let me proceed?

19 THE COMMISSIONER: Yes.

20 MR. THOMSON: I am happy, of course,
21 to answer your question but if I could just proceed
one more step --

22 THE COMMISSIONER: Yes, all right.

23 MR. THOMSON: -- in where I am
24
25



CC5

1
2 attempting, the point I am trying to get you to
3 examine. First, to make it clear, I agree the Court
4 of Appeal did not address it. I am not sure that the
5 submission I am making has been made here before
6 because I am a relative newcomer to the scene, but
7 what I want to say, and I haven't really got to the
8 punch line, if you like, is this. It is one thing
9 for you to, for example, admit evidence of so-called
10 'dirty tricks' from the witnesses whom you have heard
11 to date and ask them all kinds of things about what
12 they said, what they did and all the rest of it, that's
13 one thing, and my client's civil rights may be
14 affected by that too, but in my submission it is
15 quite another thing to be putting questions to her
16 about that, she having already been identified
17 allegedly by people here as a prime suspect, having
18 been pointed to as a prime suspect in statistical
19 terms in the Atlanta Report.

20 So, what I am really talking about
21 this afternoon is not whether you should - indeed,
22 you already have - admit into evidence things about
23 who put lipstick marks on lockers, I am not asking
24 you to disregard that by saying you should not have
25 received that. What I am saying to you this afternoon
is that you must not allow my client to answer



1
CC6 2 questions about areas in which the answers that she
3 gives will not be relevant to the cause of death and
4 useful to you in the final analysis.

5 Now, let me make something clear.
6 You put to counsel for the Nurses' Association the
7 question that says, well, am I supposed to rule on
8 the probative value of this evidence as it comes
9 along. As a trial judge it is an outrageous proposi-
10 tion to ask a court to rule on anything to do with
11 the probative value. Mr. Scott and Mr. Hunt tell me
12 this may be of some help and they may be right, I'll
let it in and then I will sort it out.

13 My lord, with respect, that is, I
14 say, probably an appropriate way to deal with the
15 evidence of the so-called 'dirty tricks' as it came
16 in from people who saw what was happening. That is
17 not a fair way of dealing with lines of questions
18 that are going to be put to my client, who is required
19 under the law to answer questions directed to the
proper process of this mandate. I say that is the
key to this resolution.

20 What you are asked to decide today,
21 this afternoon, is not, in abstract terms, the
22 admissibility of this kind of information. You are
23 being asked to decide what are the limits of the
24
25



1
CC7 2 questions that can be put to my client in the balance
3 of her evidence. I have given you three limitations
4 and I think all of them have been rejected in the
5 respective submissions by Mr. Hunt and Mr. Scott, and
6 I can put them into focus. I say three limitations
7 and here they are. I say, first of all, they have
8 to be relevant to the inquiry and, as you said, that
9 is no different from where we were last week, my
10 lord, before the Court of Appeal spoke; that is no
11 different. They have to be relevant to the inquiry
12 and, with respect, you do have a general discretion
13 that says if, although it is tangentially relevant,
14 you can scratch your head and say, maybe, but if in
15 the reality of things it doesn't really advance the
16 process and what it does is it involves my client in
17 unnecessary, lengthy public cross-examination, you
18 have a discretion to reject it, notwithstanding the
19 obiter dictum in the Judgment of the Court of Appeal.
20 I don't think there can be any doubt about that.

21 Now, the second one, and this is
22 what is new, this is what is new since the Court of
23 Appeal spoke, you have to decide whether or not
24 evidence that she will give is useful to you because,
25 if you are prohibited from making use of evidence
that is being tendered, then it ought not to be



CC8

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

accepted. Sure, it might be of interest to the press, to the television, to the parents, and I have sympathy there, believe me, but my interest is in attempting to direct you to a course of action that does not violate the rights of my client in this situation, and I say, if we go back to the example that you gave, in order to make what I say is sense out of the direction of the Court of Appeal - and I refer you to a passage that we haven't read out loud, although I know you read it to yourself, page 11, middle of the page, sir, the second-last paragraph at the bottom of the page:

"This inquiry should not be permitted to become that which it could not legally have been constituted to be, an inquiry to determine who was civilly or criminally responsible for the deaths of the children or, in the circumstances of this case, in lay language simply: who killed the children?"

The parents, by their counsel, understandably, from their point of view, are distressed by that statement, and I mean that, I am not trying to be sarcastic, they are understandably



CC9

1
2 distressed by that.

3 Now, when you read that in context,
4 however, sir, I say that what that is saying to you
5 is that you may not, directly or indirectly - you
6 talked about the five year old child - you may not
7 directly or indirectly, by making findings of fact
8 implicit in a narrative, identify the person who
9 in your opinion may be guilty of some wrong doing.

10 THE COMMISSIONER: Well, I can't
11 do it directly. The real problem is, of course, I am
12 forced to do it indirectly because one of the reasons,
13 if I should make it a reason, for finding that the
14 children died by foul play, if you want to put it that
15 way, might be a reason that points to a particular
16 person. That might be the reason. I don't know how
17 to resolve that. That is a problem we don't have to
18 resolve today. That is something that is perhaps
19 for general argument at the end of this phase.

20 MR. THOMSON: If you don't resolve it
21 today, you won't be resolving my submission. You may
22 well decide you don't have to resolve it today but
23 this is really the point that I am trying to make. If
24 you don't resolve that today, you won't be resolving
25 what, if any, evidence is not useful on the basis
that it --



CC10

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: Wait, wait, wait.

It might be useful. I just couldn't refer to it in the report, that's all. You see, the extraordinary part is I might go through the mental process and then never be able to tell how I went through it. I don't know, but I don't blame the Court of Appeal for that. It is an insoluble problem.

MR. THOMSON: I don't blame anybody for that. All I am concerned about is saying to you that, in light of this determination by the Court of Appeal and the Court of Appeal's comment at the end that, if an impasse occurs in terms of the kind of resolution that we have, that you, sir, are to decide in favour of the civil rights of the individual involved, then --

THE COMMISSIONER: That is what I said to Mr. Scott, and he said I was wrong. He said it is only in the report, it is not when I am assessing the evidence or at least determining whether the evidence is admissible.

MR. THOMSON: Fortunately for me, sir, Mr. Scott is not the judge today, sir, you are, and I am asking you to consider the overriding implications because what Mr. Scott has done is very nicely drawn a line that says, oh, let all the evidence in, we have



CC11

1
2 no problem because, when you come to write a report,
3 you can write a report that won't violate that.

4 Let me put to you, sir, that I can
5 certainly see in theory now how you can write a report
6 that doesn't violate that. Whether it adequately
7 answers the question, by what means babies died, I
8 don't have any quick answer to that.

9 I am saying to you that if you
10 accept Mr. Scott's invitation and that of other
11 counsel to say, oh, well, what we put in the report
12 I will deal with another day, that is really an
13 invitation to permit questions of my client over the
14 coming week which you don't need to have answered and,
15 if you don't need to have answers, there is no right
16 that her rights be abused and that she be required
17 to stand here publicly and answer questions as a
18 suspect in a proceeding of this kind.

19 So, as I say, that is what I am
20 trying to do in reply, to point out to you that what
21 Mr. Scott has done is divide it and said the Court of
22 Appeal isn't talking about evidence at the inquiry,
23 indeed, they say consider it all. I know that is
24 what they said, perfectly right.
25



1
2 But when they said that they were of course
3 addressing the question of what ought you to be
4 saying in your final report. I say the bottom line
5 is, they said to you you must not directly, or
6 indirectly name the suspect. Whether you agree
7 that you have to decide this today, please, I just
8 want to make sure that you understand my submission.

9 It is that they may not do it
10 directly, and you have given the example yourself
11 in terms of the five year old child has no difficulty
12 deciding. If I am right, sir, that evidence is not
13 therefore useful to you in that sense, and the
14 evidence is already before this tribunal. I mean,
15 somebody said about my client, well she wants
16 special treatment. Remember the evidence is that
17 my client has answered the questions of Police
18 Officers numerous times in the past, and you have
19 transcripts of her cross-examination at the
20 preliminary enquiry. She is the witness who
21 appeared there and was cross-examined extensively,
22 you have all that.

23 I alluded this morning to the fact
24 that the Attorney General in giving you this mandate
25 talked about, you should refer to those transcripts,
don't ask questions which are "unnecessary". As I



1
2
3 said, I'm not trying to close the Commission's door
4 to this evidence that is not my view of
5 tenuous admissibility, I am only talking about the
6 propriety of questions that are seen, with respect
7 by the public at large, to be accusatory in nature.

8 That brings me to the third point
9 which I dealt with this morning. I said they have
10 to be relevant; they have to be useable; and they
11 ought not to be questions which in their form and
12 substance amounted to accusations of wrong doing of
13 my client. And I don't want to have to go over that
14 again, you have heard that. I am obliged to you
15 for allowing me to develop the other two points as
16 I have.

17 THE COMMISSIONER: Thank you Mr.
18 Thomson. Mr. Lamek, do you have anything?

19 MR. LAMEK: I don't think so at
20 this time Mr. Commissioner. Thank you.

21 THE COMMISSIONER: The problems
22 that we have been addressing today arising out of
23 a decision of the Court of Appeal involved the
24 report in Phase I, the report in Phase II and the
25 evidence that should be received in either Phases.

The only immediate urgent problem
is the evidence to be received in Phase I, because



3

1
2 the last witness, Phyllis Trayner, is in the midst
3 of examination by Commission Counsel and that
4 evidence must proceed. Counsel must know what areas
5 they are going to be permitted to canvass so they
6 can prepare their cross-examination.

7 The other matters, as I say, can
8 remain for another day. Although the other day for
9 some of them will not be far remote.

10 On the question of the evidence
11 to be received in the course of the examination and
12 cross-examination of Phyllis Trayner, and for that
13 matter the remaining witnesses if there are any
14 in this Phase, I can see some conceivable argument
15 or relevance in all of the general areas canvassed.
16 I accept Mr. Scott's argument that the injunction
17 to resolve an impasse in favour of the protection
18 of the civil rights of persons who might be
19 criminally or civilly involved applies to the
20 report, not to the evidence.

21 As the evidence proceeds, it may
22 develop that any particular question cannot
23 illicit any evidence that would be helpful to the
24 remaining issues. I will rule upon that question
25 at the time that the objection is taken.

That I think resolves the



4

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

problem so far as the evidence of Mrs. Trayner is concerned. I assume that we will proceed with her evidence tomorrow morning, is that --

MR. LAMEK: Yes sir, at 10:00 o'clock.

THE COMMISSIONER: All right. If no one else has anything we will rise until 10:00 o'clock tomorrow morning.

MR. HUNT: Could I raise one question, sir. At one point my friend, Mr. Thomson indicated his desire to be here for certain portions of the cross-examination, and I know he said he had a problem this week on Tuesday, which was yesterday.

THE COMMISSIONER: Yes.

MR. HUNT: I also think he had a problem next week as well.

THE COMMISSIONER: Well, I thought that was a problem that he could resolve, isn't that right Mr. Thomson.

MR. THOMSON: I said I would work on that and I haven't asked you for any indulgence about that, we will keep going.

THE COMMISSIONER: Yes. We are not going to be sitting on Monday because it is a legal holiday. It is about the only advantage that



5

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

lawyers have over other people, at least that is litigation lawyers have over other people where we don't sit on Monday. So I don't think that is a problem. We will just proceed in the ordinary course, you expect to be finished tomorrow, do you, or not?

MR. LAMEK: Yes. I expect to finish tomorrow, sir.

THE COMMISSIONER: Yes. That would follow then unless - I think it now follows by Mr. Brown and Mr. Hunt in that order. So I don't think there is any real danger of anyone else being called on tomorrow. We will just stop at the ordinary time tomorrow afternoon.

MR. HUNT: Thank you sir.

THE COMMISSIONER: All right.
Until 10:00 o'clock tomorrow morning.

--- Whereupon the hearing adjourned at 3:00 p.m.
until Thursday, April 19th, 1984, at 10:00 a.m.

